IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GREGORY THOMAS BERRY, et al.,

Plaintiffs;

v. Criminal Action

3:11CV754

LEXISNEXIS RISK & INFORMATION
ANALYTICS GROUP, INC., et al,

Defendants.

December 10, 2013
Richmond, Virginia
10:00 a.m.

FAIRNESS HEARING

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: LEONARD A. BENNETT, ESQ.
MICHAEL A. CADDELL, ESQ.
JAMES A. FRANCIS, ESQ.
DALE W. PITTMAN, ESQ.
CYNTHIA B. CHAPMAN, ESQ.
MATTHEW J. ERAUSQUIN, ESQ.
Counsel for Plaintiffs;

RONALD I. RAETHER, JR., ESQ.
JAMES F. McCABE, ESQ.
DAVID N. ANTHONY, ESQ.
Counsel for Defendants.

ALSO PRESENT: ADAM E. SCHULMAN, ESQ.; CHARLES B. MOLSTER, III, ESQ.; KIMBALL R. ANDERSON, ESQ.; EDWARD W. COCHRAN, ESQ.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Case Number 3:11CV754: Gregory Thomas Berry, et al. versus LexisNexis Risk Information Analytics Group, Inc., et al. The plaintiffs are represented by Leonard Bennett, Matthew Erausquin, Dale Pittman, David Searles, Cynthia Chapman, James Francis, and Michael Caddell. The defendants are represented by David Anthony, James McCabe, and Ronald Raether, Jr. Objectors are Adam Schulman, appearing pro se, and Megan Christina Aaron, et al., represented by Charles Molster, III and Kimball Anderson. Are counsel ready to proceed?

MR. ANTHONY: We are, Your Honor.

(All counsel responded in the affirmative.)

THE COURT: All right. We will hear from plaintiffs.

MR. CADDELL: Yes, Your Honor. Mike Caddell, Your Honor, for the class. Your Honor, I think it is important, there has been a lot of paper filed with the Court, and some serious accusations laid against class counsel with respect to this settlement. And so I want to go through, I want to make sure that we have an adequate record for the Court and for any appellate court that may look at this, so we have prepared a PowerPoint to go through these points.

First, Your Honor, the injunctive relief class

is defined as all persons about whom information was in the Accurint database from November 14th, 2006 to the date when the Court entered its Preliminary Approval Order. So the Court understands, that represents about 200 million, give or take, adult Americans. Virtually everyone who applied for a credit card, who had a transaction, a credit transaction of any kind.

We retained a privacy expert, Neil Richards. He consults, he is the advisor to the ALI's Privacy Law Project. He was a Law Clerk to Chief Justice Rehnquist and Judge Niemeyer on the Fourth Circuit. He was a UVA Law graduate. He has looked at this. And this is, so the Court appreciates, this is the only evidence. There's a lot of argument, but this is the only evidence that's before the Court from an outside expert or anyone else. Actually, there's some other evidence that I will put before the Court, but this is the evidence that demonstrates the value of the injunctive relief that's being obtained by this settlement.

The Court may recall at the preliminary approval hearing and from the presentation we made to Magistrate Judge Lauck, this injunctive relief has been described by the defendant as a massive earthquake, as a sea change. And you will see that one of the problems that the objectors make is in likening this case to other cases

where, frankly, injunctive relief was of little value. We will get to that in just a minute. But in this case, what we obtained for the class, and again, this is a class comprised of almost all adults in the United States, are the protections of the Fair Credit Reporting Act to things like a report called Contact & Locate, which would not be obtainable under the Fair Credit Reporting Act. So we are actually getting more rights for people in some instances -- and we've got a concrete demonstration of how that's valuable -- than they could get even under the Fair Credit Reporting Act.

The proposed injunctive relief squarely remedies conduct targeted in this litigation and two prior related cases by providing a full range of Fair Credit Reporting Act protections for Accurint reports in the collections arena. This settlement will affect about 20 million consumer reports a year. Every year, Accurint is the industry leader in issuing collections reports. They do about 20 million a year. And this settlement will dramatically change those -- the way they handle those credit reports and the rights that consumers have with respect to those reports.

As Mr. Richards, Professor Richards noted, they also incorporate into this settlement what are called information privacy principles, transparency, security,

things of that nature that are sort of best practices in the area of data compilation and data use. The Court is aware that there is so much information out in -- available about all of us. And I know that it is critical to the class that these protections be afforded.

One of the criticisms we have been -- that have been asserted by the objectors is that they are complaining that injunctive relief is not available under the Fair Credit Reporting Act to private litigants. There is actually a split of authority. Clearly, the great weight of authority agrees with that position. There are some cases that are contra to that. The truth is, the Fair Credit Reporting Act is silent on the issue of whether a private litigant can obtain injunctive relief. For that reason, some courts have held, many courts have held that that's not available.

This is not actually, though, a criticism of the settlement, but in fact, it should be something to be applauded. Because what we have obtained through this settlement is something that, if the objectors are right, we could never have obtained through litigation. So we have obtained something better than what they could have obtained through litigation. Again, this is Professor Richards's assessment of the value of the injunctive relief. He valued the injunctive relief in various ways.

One value that he placed on it was that it was worth as much as $2.2 billion to the class. Another way he valued it, he said even if you assigned an unreasonably low value of just a dollar per report, you are talking about the value of the settlement being over $20 million a year every year.

Let's look at some of the specifics, the overview for the collections. What we have to know, Your Honor, and we will show you in a minute, if you go on the LexisNexis Accurint website today, if you did it right this minute in the courtroom, what you would see is that LexisNexis says, "We are not a credit reporting agency, and our reports are not subject to the Fair Credit Reporting Act." And therefore, you are not going to get any rights. They don't say this last part, but the reality is, because they take the position that they are not subject to the Fair Credit Reporting Act, then of course they don't provide consumers the rights afforded them under the Fair Credit Reporting Act.

So what we are obtaining for consumers with respect to these collections reports, which is the bulk of what LexisNexis does, the Accurint Division, we are giving them full Fair Credit Reporting Act coverage and the rights, including reasonable procedures, to assure maximum possible accuracy, the restriction of the use of the

reports to only permissible purposes, full file access and disclosure at no charge, and investigation and correction of inaccurate information. And we are doing all of this and still allowing class members to sue LexisNexis for actual damages in individual lawsuits.

Contact & Locate, which will be a stripped-down report, which will exclude most of what are called seven characteristics data -- seven characteristics, the Fair Credit Reporting Act identifies seven characteristics such as credit, credit standing or mode of living, employment, things of that nature. The Fair Credit Reporting Act identifies seven characteristics which it says help you determine whether a report is in fact a consumer report. The Contact & Locate, the new Contact & Locate Report that is going to be utilized by Accurint if the Court approves this settlement will strip out most of that data. And yet, the consumer will still be able to get a free copy of the report, which is not something that the consumer is entitled to if the report is not covered by the Fair Credit Reporting Act. So this is a right that we are getting for consumers that they would not have under the Fair Credit Reporting Act, and we are giving the right for the consumer to correct information belonging to another consumer through a 100-word statement. And I'll talk a little bit more about that in a minute.

But still, class members can still sue LexisNexis with respect to Contact & Locate Reports for actual damages in individual lawsuits.

So going through these item by item, you can see these are provisions of the Fair Credit Reporting Act. These are rights that consumers now have or will have, I should say, if the Court approves this settlement because of this settlement. Use of reports restricted to permissible purposes, that's 1681b, aged information is excluded from reports, 1681c. Implementation of reasonable procedures to ensure maximum possible accuracy. That's 1681e. Free full file disclosure upon request, including not just the file, but also, an identification of everyone who has asked for your file, and all end users of a report. That's the 1681g and 1681i claims.

The right to dispute. Consumers now, and you will see, again, consumers don't have the right to dispute information in their file right now. With this settlement, they will. And they can have it corrected if it is inaccurate information. And then actual damages for negligent FCRA violations. Statutory and punitive damages for willful violations. And you will see that this settlement actually establishes a standard now against which a willful violation can be judged, which is something we did not have before. And the right again to

correct information belonging to another consumer, a right that's not available under the FCRA at all.

Now, you've got an objection, and sort of the overview, Your Honor, you have one objection and only 18 opt-outs from the roughly 31,000 persons who were sent individual notice for the 23(b)(2) -- 23(b)(3), the monetary relief class. That one objection was very revealing. If I might hand this up to the Court through the Clerk, Your Honor, this is the objection of Mr. and Ms. Nix, JoAnn Nix, to the (b)(3) class. And the great thing about this objection is, and this is in the Court's file, this is evidence of the value of the (b)(2) settlement, the injunctive relief settlement.

So what does Ms. Nix say? She says, first sentence of her letter, her objection: "I see no response to the problem herein described in the class action settlement involving consumer reporting as referenced above." Now, she is talking about the monetary relief settlement. She is talking about the roughly $325 that she will get a check for. She doesn't realize that there is an injunctive relief settlement that is going to solve the problem. She goes on to say: "The resolution I seek is for LexisNexis to stop giving out incorrect information and refusing to correct their mistake." That's what this case is about. The monetary relief is important, and I'll

explain why in just a minute, but the thrust of this case was to correct a practice that affects or results in 20 million reports a year, that has the potential to affect every adult in the country.

And if you continue this objection, the next paragraph, she says: "I constantly receive harassing calls from debt collectors for a person I have never heard of. That person is Alaine Nix. Attached are records of at least 16 calls going back to 2008."

If the Court turns to the third page of Ms. Nix's objection, you can see she has handwritten notes identifying calls going back to 2008, call after call after call, with respect to debt collectors.

Now, apparently at some point, she found out that these calls were originating because of a report issued by LexisNexis for collections. So she called LexisNexis. And what did they tell her? She said, at the bottom of the page, you can see, "We gave up on stopping the calls..." You can see the last paragraph. She says, "We gave up on stopping the calls after receiving the attached letter from Accurint. The letter is very confusing and is intended to sound very intimidating legally. However, in the fourth paragraph is where I base my objection. I quote: 'We do not examine or verify our data, nor is it possible for our computers to correct or

change data that is incorrect. Accurint can provide only the data that was provided to us."

Then on the next page, you can see, Your Honor, in the second paragraph, she says: "The resolution I want is for these above-referenced calls to stop. At least two of the calls told us they get their information from LexisNexis."

If you look at the next page in the exhibit, it says Accurint, and this is the letter she got from Accurint, September 2nd, 2011. Look at the third paragraph, Your Honor: "Kindly be advised that Accurint is NOT -- NOT is in all caps and bold -- a consumer reporting agency. And as such, Accurint is not governed by the Fair Credit Reporting Act. Accurint data is not permitted to be used to grant or deny credit."

That's the point of this settlement, to help someone like Ms. Nix. She now will have, because of this settlement, she now will have a remedy. She now will have the ability to not only correct any information in her file, but, and as you can see the second bullet point here, she will actually get to put a 100-word statement in the file of another consumer. And the Court has had this issue before it in the past in the INTELIUS case where the Court recognized that the Fair Credit Reporting Act doesn't give a consumer the right to contest information

in another consumer's file. After this settlement, with respect to LexisNexis and Accurint, a consumer will have that right. They will get the right to put a 100-word statement in the file of someone, a consumer whose file has been linked to theirs. These calls will stop for Ms. Nix because of this settlement unless the objectors get their way.

MR. BENNETT: Your Honor, would it assist the Court to have a hard copy of the PowerPoint?

THE COURT: Sure, I'll take it.

MR. BENNETT: We can do a copy for each counsel. This morning we were at Mr. Anthony's office. He was kind enough to print these, the updated version, but there will be maybe one or two instances in which there is a new slide and Mr. Caddell will point that out, Judge.

MR. CADDELL: Your Honor, I'm on Slide 11 right now.

This settlement is a sea change. This settlement is an earthquake. This is not some warning about diaper rash. We will get to that in a minute.

Not only is this settlement an earthquake for consumers in terms of their rights. All of a sudden, people will get notice when action is taken with respect to these reports. People will have the right to get their reports from LexisNexis, their complete file. People will

have the right to contest that information. LexisNexis is spending a lot of money to make this happen. They are spending out of pocket about $6 million to overhaul its products sold to debt collectors.

One of the objectors belittled the fact, sort of made it sound facetious, that LexisNexis, one of the costs is they are going to have to train their personnel. Of course they are going to have to train their personnel. They have never done this before. They never gave people rights. When people called, all a LexisNexis employee had to know to say is, "We are not a consumer reporting agency, we are not bound by the FCRA, end of story, we are done and we will send you a form letter." Now these people have to be trained that the rights of consumers are to receive a file, that they can contest information in their file, they have to do investigations. Of course it is going to take training. Of course they have to completely refigure, reconfigure their computers. They are reconfiguring their products. So we initially estimated, LexisNexis initially estimated it would cost about three to four million. And in fact, that's the number we used with Judge Lauck about a year ago when we first -- when we went through the settlement with her as part of the settlement, the mediation process. It now turned out that it cost more. I'm sure the Court is

familiar with that, too. Unfortunately, it seems like everything costs more than it was originally estimated to cost. And so it actually cost about $6 million. That's before the Court in an affidavit, a Declaration from a LexisNexis operations personnel.

LexisNexis has also estimated that it will suffer a negative business impact as a result of these changes of about $5 million. Here is the reality. This is not good for business. People want to use reports that make it easy for them not to give notice to consumers, not to have to worry about somebody contesting the accuracy of the information. They would prefer to use a report that is not subject to the Fair Credit Reporting Act because the Fair Credit Reporting Act gives people rights. So of course LexisNexis is concerned, and rightly so, and they will, they are a business leader, and the business leader in this area, and they believe, their estimate is that it is going to cost them about $5 million in lost business. So just the out-of-pocket costs alone, out-of-pocket and lost business, is going to be about $11 million. And from this point forward, LexisNexis will now be fully exposed for Fair Credit Reporting Act claims if the information is furnished without full privacy and accuracy protections.

So what release are we giving up in exchange for this very valuable right? We are giving up a release of

the 1681n claims for willful non-compliance and related remedies and giving up the use of the class device. I'll talk about both of those in more detail. But basically, the willful non-compliance is the leverage that we have used to obtain this earthquake, this sea change in business practices. The use of class device is only valuable in the Fair Credit Reporting Act context with respect to a statutory claim. I'll explain that in greater detail. We are not releasing any individual violations of statutes. We are not releasing individual claims for actual damages.

Your Honor, you know, this Court knows, and the judges in this courthouse know, that hundreds of Fair Credit Reporting Act cases are pursued on an individual basis for actual damages. And in fact, the actual damages can be substantial. This Court is perhaps better situated than any court in the country to assess the likelihood that individual claims for Fair Credit Reporting Act violations will be pursued and pursued successfully. So these claims are being preserved. We are not surrendering those claims. Those are not being released. In fact, for example, Ms. Nix: Who knows? Maybe she had a claim. Her claim is not going to be released. And then any claims unrelated to Accurint. So any claim. So this is not an overly broad release in the sense that we are releasing

everything that anyone might have against LexisNexis. We are only releasing the statutory, willful non-compliance claim and the use of the class device with respect to Accurint.

And then we are agreeing contractually that Contact & Locate is not a consumer report under the limited circumstances of the settlement. By that, I mean what we are doing is we are taking one report, a comprehensive collections report, and we are splitting it into two parts. The collections part, which will have all the old data, or pretty much all the old data, will be subject to all of the Fair Credit Reporting Act. The Contact & Locate Report, and the Court is aware, I'm sure, if you are just publishing a name and an address, and even a Social Security Number, you are not subject to the Fair Credit Reporting Act. The case law is pretty clear that as to those, that type of information, it does not bear on the seven characteristics. And so therefore, it is not a credit report or consumer report under the Fair Credit Reporting Act.

So limiting it to that, we have agreed that it is not a consumer report. But we are still getting the rights that I just described, even with respect to those reports. So we are doing actually something better than the Fair Credit Reporting Act would provide.

The injunctive relief settlement, Your Honor, it is not required, notice is not required for a (b)(2) settlement. But we did it anyway. There was a notion raised by one of the objectors that alternate notice was available. In fact, that's not true. While there is this notion that there is a file maintained on roughly 200 million people, you don't know who had inquiries issued with respect to them, you don't know, you've got mixed file problems, you've got multiple address problems. So we provided published notice, website, toll-free telephone number, banner advertisements on the Internet, search engine keyword, and sponsorship. We did have publications in national media. And we submitted a report from our notice provider that the notice reached about 75 percent of the potential class. Now, that's 75 percent of 200 million adults in the U.S.

Now, let's turn briefly to the monetary relief class. That's basically everyone about whom LexisNexis -- who requested a copy of their report or submitted a dispute with respect to their report. We thought these people are the ones most likely to have been affected by the reports that LexisNexis had been issuing in the past. The Nix objection is a perfect example of that. Ms. Nix is going to get a great benefit from this settlement. And yet she is someone who was affected by

this problem, and she found out that it was LexisNexis and their Accurint report, and she contacted them and they wouldn't help her. So that's an example of how we picked correctly the people who are most likely to have some claim of actual damages.

Now, Ms. Nix could opt out of that class if she wished to do so, and she could retain a cause of action if she wished to pursue it for her 16 calls. You can see, however, what Ms. Nix really wants is the injunctive relief. She wants the calls to stop. If the calls stop, her objection is satisfied. And that's what the injunctive relief does. For the monetary relief class, it is a $13.5 million fund. Payments are made pro rata. The service awards are capped at $5,000 per named plaintiff. Class members don't have to take any action to receive their share of the settlement fund. And on a pro rata basis, given the likelihood, the reality is, out of 31,000 people, some people for whatever reason will never cash the check. It just happens we know this from past experience. The reality is probably 85 to 90 percent of the checks will be cashed. There will be -- the monies will go back out to people. There will not be any reversion to LexisNexis. And so at the end of the day, class members should receive at least $325 per person net, net of any attorneys' fees.

Direct mail notice was sent to the (b)(3) class. It reached 88 percent of the class. This settlement does release claims under the Fair Credit Reporting Act and comparable state laws.

Now, in the context of this settlement, there is a presumption of fairness for a mediated settlement. Where you have a settlement that's reached through arm's length bargaining, investigation and discovery are sufficient to allow counsel and the Court to act intelligently. Counsel is experienced in similar litigation. And the percentage of objectors is small. We meet all four of those criteria.

There have been multiple mediation sessions, some nine or ten, over the last four years. Judge Dohnal, I remember being here in this courthouse back in 2010 where Judge Dohnal for the first time saw, and we put on the laptop in one of the conference rooms here, the settlement conference rooms with Judge Dohnal, the Accurint report, collections report, and said, "Judge, this has got to be covered by the Fair Credit Reporting Act." It was that occasion where I met Mr. McCabe for the first time. We had Randy Wulff in Oakland, California conduct four in-person mediation sessions. Mr. Wulff was selected in 2002 after a nationwide search. He was selected to mediate all of the 9-11 World Trade

Center commercial claims arising out of the 9-11 tragedy. He spent three years in New York doing it. He is one of the most highly respected mediators in the country. Then we, about a year ago, went before Judge Lauck, had a three or four-hour presentation, walked through things with her. At the end of that, Judge Lauck, well, in fact we will get to that. We appeared before her January 14th, 2013. So as I said, about a year ago. We went through with specific screenshots showing her what the new products from LexisNexis would look like, what the new collections decisioning product would look like, what the new Contact & Locate product would look like, what rights would be afforded consumers. We gave her extensive detail. The hearing lasted, as I said, several hours. And at the end of that, her comment: "I do think it is a sea change and a good one and a thoughtfully conducted one." It goes on to say, "This does strike me both as a set of circumstances where you all have worked hard to see what's fair, to give up on some things you may not wish to have given up on, but then also sort of seeing the high horizon, the common sensible approach that's going to have to come at one point or another."

Now, in this Circuit, JIFFY LUBE is the analytical model for considering the fairness of a settlement. There are four fairness factors, and there

are four adequacy factors. The fairness factors are the posture of the case, the extent of discovery, the circumstances surrounding negotiations, and the class action experience of counsel. We have pursued these claims since 2008. We first recognized that there might be a claim back in 2006 when we had another case against LexisNexis involving another product, not the Accurint product. And we began thinking, "This Accurint product really should be covered by the Fair Credit Reporting Act." It was not part of that settlement or that litigation. But after that litigation was resolved, we agreed to pursue the Accurint claims because, again, they represented such a huge number of reports every year that consumers had no idea were being issued.

The first settlement meeting concerning this case, this litigation, occurred in Mr. Bennett's office after the WILLIAMS case was resolved, but before any other Virginia action.

In the ADAMS case -- so the Court will have heard about three cases. There were two cases that were competing with one another to some extent, although they were at different points and slightly different perspective. The ADAMS case was proceeding in New Jersey before District Judge Bump. That was Mr. Francis's case. In that case, they defeated a Rule 12(c) motion for

judgment. In the GRAHAM case, which was here in this Court, originally before Judge Williams and then transferred to Your Honor, Judge Spencer, that was the case where Judge Dohnal moderated a settlement conference. We fully briefed a motion to dismiss for lack of subject matter jurisdiction in the GRAHAM case. We conducted discovery in all three cases. Discovery is near complete. There really isn't anything we don't know about this particular issue. We have had written discovery, thousands of pages of document productions. There were depositions of five LexisNexis employees and class representatives. We have had face-to-face meetings with LexisNexis technical personnel. You know, sometimes, Your Honor, in cases like this where a lot of this data, in fact all of it, I think the number, I may be wrong, LexisNexis says they have 38 billion pieces of information about consumers in the United States. 38 billion pieces of information. They issue some 20 million reports a year with respect to collections. This is a highly technical area. And so sometimes the lawyers have to either get educated or they have to speak directly to the technical personnel to see what's possible. And we had to do that. I think that's one reason why LexisNexis originally estimated that the cost of implementing these changes would be three to four million. It has turned out to be 6

million. It is an expensive proposition to change, to make a massive change like they are making in this case.

Circumstances surrounding the negotiation he is, I referenced this just a minute ago. The reality is, this was a hotly contested, at times hotly argued case. We had some moments where tempers were frayed. We worked closely with, as I said, several mediators, several third parties. There was never any discussion of service awards or attorneys' fees until after the settlement was reached. And I will tell you, with respect to that, the objectors, particularly, I guess, Mr. Schulman, argues that, well, there is sort of a wink-wink, nod-nod. "Everybody knows, you are just going to do this settlement and it is not going to be that big a deal, and then you are just going to get this big wad of money." I can tell you that when we did get to the discussion of attorneys' fees, that was still just as hotly contested and hotly argued as the rest of the settlement.

Experience of counsel: It is interesting, this is an element which the objectors misrepresent. In JIFFY LUBE, what they say is, "What are the opinions? Are the counsel advocating the settlement experienced in this particular area of the law?" They parse out just the part about counsel advocating the settlement. And they say, "Well, of course, the lawyers that reach the settlement

are going to advocate for the settlement, so that doesn't mean a whole lot." If that were the test, I might agree with them. That's not the test. The test is, are counsel experienced in this area? Frankly, Your Honor, it means something when I've been practicing 34 years, I'm a UVA Law graduate. I have collected billions of dollars in class actions. I have done 15, 20 Fair Credit Reporting Act cases. Frankly, when I tell you this is a good settlement, that means more coming from me than it does from Mr. Schulman, for example, who is a third year lawyer, who near as we can tell has never Done a Fair Credit Reporting Act case, has never served as class counsel in any significant case. That's the key. You've got assembled in this room at this table the lawyers who have tried more Fair Credit Reporting Act cases to verdict than any other lawyers in the country. You've got the lawyers in this room that have obtained the largest individual Fair Credit Reporting Act recoveries. And I use the term "recovery" advisedly. I never like lawyers who put on their website their verdicts, because often, when you get into investigating those verdicts, you find out they didn't result in any recovery of any money. So recoveries are what count. My clients are really interested in "How much money am I going to get at the end of the day?" These lawyers have gotten the best

recoveries in Fair Credit Reporting Act cases in the country. They have made more for their clients. They have recovered more in damages for their clients than anyone else in the country. They have litigated more Fair Credit Reporting Act cases than anyone in the history of the statute. The statute is some 40 years old. But frankly, it really wasn't until people like Len Bennett and Jim Francis came along and began using that statute to pursue rights for consumers that it became the valuable tool that it is today for people, that it really, they vindicate people's rights on a daily basis. These lawyers have had, Mr. Bennett has had substantial Fair Credit Reporting Act appellate success, including five of six cases in the Fourth Circuit.

Our team is collectively responsible for four of the top five class action recoveries in history. My firm, me personally, we have been lead or co-lead in over two billion in class action recoveries. We've got team members with extensive trial and class trial experience.

So the fairness factors are met in spades. Then we get to the adequacy factors: Is the substance of the settlement reasonable given the risk of litigation? And again, there are four JIFFY LUBE factors: Relative strength of plaintiffs' case on the merits; existence of difficulties of proof or strong defenses; the solvency of

the defendant and likelihood of recovery; and degree of opposition to the settlement.

Your Honor, we are not here arguing that we don't think Accurint's collections reports qualify as consumer reports under the Fair Credit Reporting Act. We believe strongly that they qualify as consumer reports. Unfortunately, no Court has ever said that. No Court, nor the FTC, has ever said that the Accurint for Collections identity reports qualify as consumer reports under the Fair Credit Reporting Act. The closest was in ADAMS, when Mr. Francis's firm defeated a Rule 12(c) motion for judgment that was arguing the contrary.

Now, as the Court knows -- I'll get to that in just a minute.

In GRAHAM, we briefed a motion to dismiss for lack of subject matter jurisdiction. Had we gone forward in GRAHAM, I feel confident that we would have won that motion. We didn't go forward in GRAHAM because as we began to refine our thinking about the litigation, and actually, in conversations with Mr. McCabe, we realized that we might not have class representatives that met -- that were actually the subject of the reports. You know, that's one of the pernicious problems of not making people subject or not making reports subject to the Fair Credit Reporting Act, is reports are issued about you,

actions are taken in reliance on those reports, and you never know. You are never given any notice. Notice, in my mind, is the single most important right under the Fair Credit Reporting Act. Because if you give notice to someone of an adverse action taken as a result of a report, then they can take steps to correct it. They can figure out what is in their file.

For years, LexisNexis has issued these Accurint collections reports and bill collectors have made decisions based on those reports and no one has ever issued a notice to a consumer about that. It is not unless you are someone like Ms. Nix, who gets 16 calls over five years, and she follows up and she says, "Where are you getting this information? I'm not Alaine Nix." And they say, apparently two people said, "Well, we get it from LexisNexis."

In the Berry case, in this case, we argued that the ADAMS decision triggered the willfulness threshold for statutory damages. Here is the problem: Before this Court, there was a case, the FISCELLA v. INTELIUS case, where the Court said, "Consumer cannot on these facts claim that Intelius created an FCA-governed file." And went on to say, "The consumer does not have the statutory right to request Intelius to reinvestigate any consumer's file. The report he purchased or the information at

Intelius is not collectively a file on this plaintiff." It is ironic that the objectors say we are just getting LexisNexis to follow the law. Boy, they sure make it sound easy, don't they? None of them have ever tried to do anything like that. They have never pursued one of these cases. They have never once tried to take a report that's treated as not under the Fair Credit Reporting Act and have it subject to the strictures of the Fair Credit Reporting Act. We have tried, and we haven't always been successful. So there is that risk.

The majority of cases, we agree, here is the existence of difficulties of proof or strong defenses. The majority of cases do find that there is no private cause of action for injunctive relief, even though that's what we really want and have wanted from the beginning. The reality is the majority of cases find there is no private cause of action for injunctive relief. Class actions for actual damages are unprecedented. There are too many individual issues. The only real viable class claim is for statutory damages.

Here is the problem with that: Statutory damages require a finding of willfulness. Now, the Court has heard this before in other cases. The U.S. Supreme Court's decision in SAFECO held that unless there was, I think the term they used was unless it was clear, if the

language in question was less than pellucid, then it would be necessary for the consumer reporting agency or the defendant to be put on notice, to have some notice that its position was unreasonable as a matter of law.

Now, we argued that the ADAMS decision placed LexisNexis on notice that their position was unreasonable. The reality is, a Rule 12(c) motion is determined on a very low threshold. And the Court made some statements, Judge Bump did, which did not give us a lot of confidence in our ability to go forward and obtain a finding on willfulness in that case. And it is true that the FTC did issue an opinion, and the FTC opinions are issued by a vote, and this was a four to zero vote, that characterized the Accurint collections reports as not credit reports. And in SAFECO, which dealt with the Fair Credit Reporting Act, one of the specific instances or examples that the U.S. Supreme Court gave where you could attest to willfulness is if there was an instruction or opinion from the FTC. And in this case, we had the opposite.

This is the FTC letter, July of 2008. There was a complaint about a procedure and they wanted the FTC to treat LexisNexis and Accurint in the same manner that it did ChoicePoint. In the footnote, where the FTC declined to take that action, it notes civil penalties were included in the Commission's settlement with ChoicePoint.

The ChoicePoint case involved credit reports, and thus alleged violations of the Fair Credit Reporting Act, which authorizes civil penalties. Unlike that case, the current matters do not involve credit reports.

Now, if that's, if LexisNexis could rely on that, and I don't know why they couldn't, then there is no willfulness. Now, we would argue that the ADAMS decision came after the FTC letter. But it is not a strong case, or put it another way, it is a strong defense as to willfulness.

So let me parse this out just a little bit, Your Honor. I think that LexisNexis settled this case and is agreeing to pay millions of dollars and is agreeing to spend millions of dollars to initiate these changes because LexisNexis knew that, based on the history of this litigation, which we have been pursuing collectively since 2008, they knew we weren't going to go away. They knew that, frankly, we are not, you know, people who have no Fair Credit Reporting Act experience. They know that this is something we do and that we pursue and we pursue until we are successful. And I think they believed that ultimately, we would get an opinion from a court that said that these reports are in fact consumer reports under the Fair Credit Reporting Act.

Now, would that make LexisNexis liable for

statutory damages? No. It wouldn't. That's just the first step. In fact, one of the objectors, they said all of the -- the monetary relief class and the statutory damages claims and the injunctive relief all turn on one issue: whether these reports are in fact consumer reports. That is so wrong. It just demonstrates their inexperience with the Fair Credit Reporting Act.

As to the monetary relief class, if those people have suffered actual damages they don't have to have willfulness. They can prevail on a negligence standard. But as to the statutory damages class, they must prove willfulness. So it is a two-part test. They have to prove, first, the consumer report, and second, they have to prove willfulness.

Now, the next JIFFY LUBE factor: Solvency of the defendant and the likelihood of recovery. This is where we get into, frankly, Your Honor, fantasy for the objectors. There are 200 million potential class members. The minimum FCRA statutory damage claim is $100. So at the minimum level, if we were successful, that would be $20 billion. There is no way that we would ever, ever, ever, ever, ever recover even the minimum statutory damages for this case. They don't have it. The whole company doesn't have it, much less just the Accurint Division, which is a separate subsidiary. And in the

MURRAY case, which has been cited for other issues in this litigation, the Seventh Circuit noted that in a statutory damages situation where there might be damages greater than the defendant could pay, or that might exceed what would be reasonable or be disproportionate, that those damages would be reduced. So if we got some big verdict, it would be reduced way, way, way down.

The Watts Guerra objectors reference proposed release of tens of billions of dollars in monetary claims. Those are -- they don't exist, except in their minds, perhaps. There is no tens of billions of dollars in monetary claims being released here. They never were real to begin with.

Let me give you the sense of the size of the company. LexisNexis was purchased by Reed Elsevier in 1994 for $1.5 billion. This particular LexisNexis subsidiary, Accurint, is only one of several separate subsidiaries. So that 1.5 billion, let's say it has doubled in value since then. I don't know that. I don't have any information that would lead me to believe that one way or the other. But let's say it did. Even so, the Accurint Division is much smaller than that.

Reed Elsevier itself is headquartered in London and Amsterdam. It would be difficult if not impossible, and I think closer to impossible than difficult, to make a

recovery against Reed Elsevier. Again, the notion of tens of billions of dollars is just pure fantasy.

And look at it another way: Let's say you recovered $200 million for the class in this case for monetary relief. What are you going to do? Are you going to send a dollar to every adult in the U.S. who benefits from that? What they want, what people want, what Ms. Nix said is, her exact words: "I see no resolution. The resolution I seek is for LexisNexis to stop giving out incorrect information and refusing to correct their mistake." That's what people want. They don't want a dollar, or $10. They want to fix the problem. And that's what we did.

Degree of opposition to the settlement: Since the passage of the Class Action Fairness Act, of course, as you know, in class actions, we give notice to the United States Justice Department, we give notice to the Attorneys General of all 50 states and the U.S. territories. There is not a single objection to this settlement. Not a one. And I've been in cases, not as the -- actually, I have had one where we had a state Attorney General, I guess Texas, and we resolved it. So these people, there are actually people who read these settlements and they look at them and they decide is this a bad settlement; is this a settlement that takes

advantage of the class; is this a settlement that creates a problem? And they will file an objection. There was only one objection. That's Ms. Nix, to the monetary relief settlement. There were only 18 opt-outs out of 31,000, roughly, in the monetary settlement. There were only seven objections. Two of those were mass solicited by the Watts Guerra Group and Ed Cochran, and the rest were pro se, including Mr. Schulman. The relative paucity of objections recommends approval. Again, the objectors say, "Well, don't worry about that because nobody objects to class action settlements." Actually, the truth is, you've got people sitting in offices whose job it is to object to class action settlements that are abusive. That's their job. That's what they do. They look at class action settlements all day long at 50 states, the U.S. territories, and the U.S. Justice Department, and if they think a settlement is bad, they will file an objection. And not a single one did in this case.

The quality of opposition to the settlement. I guess Ed is not here. Oh, here he is. This is Mr. Cochran, Your Honor, sitting in the first row here. I've known Mr. Cochran for a lot of years. He has objected to a lot of my settlements through the years. Mr. Cochran is a nice guy, as you could converse with him, and very polite and courteous. His business model is to

object to settlements. And he does it, and if he can delay a settlement by taking an appeal, then often times somebody will pay him off. You know, 50 grand, 60 grand, something like that. That's his business model. Judge Rosenbaum in Minneapolis -- I don't know if you know Chief Judge Rosenbaum. He is since retired.

THE COURT: I know him.

MR. CADDELL: He characterized Mr. Cochran as a remora, a suckerfish attached to a big fish like a shark and it gains transportation and food that way. Different from a leech, interestingly enough, or a lamprey. But he just sort of rides along, gets a ride. In the TRANSUNION settlement that we had, a $75 million settlement, I'll talk a little bit more about that, Mr. Cochran came in, did nothing to create the settlement fund, but he did file claims on a lot of individual class members post-settlement. It was a unique settlement. I'll explain a little bit about it in a minute. And he got a 40 percent fee. He got, I don't know how much, couple million dollars probably, something like that.

MR. COCHRAN: A little bit less.

MR. CADDELL: Okay. I don't think he even filed a lawsuit. He just wrote a letter, right?

MR. COCHRAN: Filed about 18,000 claims.

MR. CADDELL: Filed the claims, but you didn't

file them in a lawsuit, did you?

MR. COCHRAN: We weren't permitted to file a lawsuit.

THE COURT: Let's direct your comments to the Bench.

MR. CADDELL: I'm sorry, Your Honor. The Watts Guerra Group, objector Aaron, is also a remora in this case. They did the same thing, mass solicited claims in TRANSUNION. Judge Posner of the Seventh Circuit in an opinion noted that Watts Guerra, though it did nothing to create the fund, stands to receive 10 to 15 million dollars in fees. In TRANSUNION, Watts Guerra secured over 50 percent of the monies it recovered for itself. That's what's really motivating the Watts Guerra Group. We are not here for justice.

Now, there is a big distinction, and this is really important, and I was lead or -- I was co-lead counsel in both cases, Your Honor. In the TRANSUNION case, willfulness was a given. What happened in TRANSUNION was, all three of the credit reporting agencies, the big CRA's, TransUnion, Equifax, and Experian had a particular practice. I don't need to go into detail as to what it was. The FTC thought this practice violated the Fair Credit Reporting Act, and they issued notice to the three, sort of a cease and desist order to the three

CRA's. And Experian and Equifax stopped. They stopped doing it. TransUnion didn't. TransUnion refused to. And so the FTC then initiated litigation against TransUnion. Ultimately, they obtained a judgment, an injunction against TransUnion to stop this particular practice. TransUnion appealed the injunction all the way to the U.S. Supreme Court, and in the meantime, TransUnion continued to do the same practice. There could be no better definition of willfulness under SAFECO or any other standard. We don't have that in this case. There is nothing like that in this case. The closest we have in this case is, of course, the ADAMS decision on a 12(c) motion, and in fact, we have the contrary, we have an FTC letter which in passing says, "Oh, by the way, these aren't credit reports anyway." So we have a very difficult row to hoe with respect to willfulness. In TRANSUNION, it was a given.

Now, what really happened in TRANSUNION: Watts Guerra took over 45 percent of the money that they got in that case. I'm not going to read these, Your Honor, but the reality is, this is not -- these are not lawyers who are pursuing the rights of affected class members. These are lawyers who got a quick killing in the TRANSUNION litigation. I don't want to go into too much detail. I don't need to go into more detail. It was a different

case. We set up a fund. Lawyers could make a claim against the fund. They did. They got paid a lot of money to do it. They never had to take a deposition, they never had to deal with a substantive motion on willfulness or anything else. They basically fought over the ability to bring the claim, but ultimately they got a lot of money. This is not that case. But what they want to do is, they want this to be TRANSUNION redux. And you can see in TRANSUNION, of course, they got more than 50 percent of the money from their clients. Maybe that's why they are not objecting to our attorneys' fees in this case.

You can see, I received $194 of my $443 settlement. By the way, you should contrast what happened there with what's happening to our monetary relief class because our monetary relief class, they are going to get more than 50 percent of the money. We are asking for a 25 percent fee. Even though the settlement agreement permitted a 30 percent fee, we are only asking for 25 percent.

Actually, this one, sort of interesting: One of these actually is, on the Internet, people are seeking lawyers to sue Watts Guerra for misrepresenting them and for taking all the money and for not handling these claims properly. They are trying to do the same thing in this case. In this case, in their fee agreement, they have a

45 percent gross recovery fee agreement. That's in addition to recovering any expenses they have.

In addition, and this is a pretty interesting feature of their fee agreement, the fee agreement, if you sign the fee agreement with Watts Guerra, you automatically authorize settlement for $443. Now, that $443, the class member may get 200. They will get the rest. But the real interesting aspect to that is, there is no settlement authority for any changes in the practice. It is just money. That's all it is. They just want money. They don't want to fix the problem, they don't want to change the practice at all. They just want to get the money. If they wanted practice changes, it wouldn't be in their -- if LexisNexis wanted to just pay them off, they could. And they wouldn't have to change a thing for the Watts Guerra Group, because all they would have to do is say, "Okay, we will give you $443," and every one of their people has already agreed to that. And they would take that and LexisNexis wouldn't have to change a single thing about the settlement and these people would go away. And that just makes it clear, they are not after meaningful relief for the class, they are not after justice. They just want the money.

There are other problems with their fee agreement. They waive ethical conflicts for Winston &

Strawn. That was a first for me, to see an advance waiver of ethical conflicts. They waive fee forfeiture for breach of fiduciary duty by attorneys. Ironically, one of the things that they complain about in our settlement is that, and they are wrong to complain about it and I'll explain why in a minute, is that there is a class action waiver, and they say, "Hey, nobody can bring a claim under the Fair Credit Reporting Act unless they bring it as a class." That again shows they have no experience in the Fair Credit Reporting Act. But in their own fee agreement, they have a class action waiver and a joint claims waiver. So their own clients, for whom they are only trying to get 400 bucks, they can't bring a claim against them except in arbitration and can't even bring a class claim in arbitration. Then another thing that's interesting is, they exclude persons who requested their report or disputed information. Those are the people who may have actually suffered some harm from this practice.

The attorneys who have objected were not aware of any experience in the Fair Credit Reporting Act for these lawyers. We can't find even one Fair Credit Reporting Act case filed by any of them not related to the TRANSUNION settlement. We can't find any consumer class action experience by Watts Guerra or the Winston & Strawn attorneys involved in the case. They are not connected to

any consumer protection or advocacy. There is no connection to NACA, the National Association of Consumer Attorneys, NCLC, National Consumer Law Center, Public Justice. Mr. Bennett and Mr. Francis have testified before Congress about the Fair Credit Reporting Act. They have dealt regularly with the FTC. Just the other day, Mr. Francis was meeting with the CFPB, the Consumer Financial Protection Bureau, which has just been established at the federal government.

Mr. Schulman is different. And I think Mr. Schulman is a nice guy. I have just congratulated him. He got married recently. The Court may recall that we are having the hearing today so he could complete his honeymoon. Turns out it may not have been the best honeymoon -- I don't want that on the record so I take that back. I'm sorry. It had nothing to do with Mr. Schulman or his wife, so don't misunderstand me. I don't want there to be any misunderstanding. Mr. Schulman is a nice guy, I think. He is someone who I think has good intentions. He is not motivated by money. But he is a third-year lawyer and representing himself. And sometimes we make mistakes. The old saw, "A lawyer who represents himself has a fool for a client." If you look -- and Mr. Schulman has had, he had, I think, a significant win in a DRY MAX PAMPERS case, although I

think that was not a great case. And then he had less than an unqualified win in the L'OREAL case. But if you look at the objections in the briefs, and I've pulled the briefs, I have briefs he filed in all three cases, they are basically the same objection every time. And he made the same objections to this case that he made in the DRY MAX PAMPERS case and the L'OREAL case.

Now, there is nothing wrong with reusing work that you have done before. We all cut and paste sometimes. But the danger is that you sometimes miss the differences between cases. You only see the similarities. Now, Ted Frank heads up the Center for Class Action Fairness. Oh, by the way, I put this on the slide, Mr. Schulman is not acting as the lawyer from the Center for Class Action Fairness on behalf of a client. Mr. Schulman is a lawyer at the Center for Class Action Fairness, but he is representing himself pro se. So there is a distinction. He doesn't have a client. If he had had a client, he might have asked his client, "Hey, what do you think of this injunctive relief?" If he represented Ms. Nix, he darn sure would have said, "Gosh, this is a great settlement because Ms. Nix's problems are going to be solved."

Now, to show sometimes how you can get bad information, Mr. Frank, who heads up the Center for Class

Action Fairness, has a blog. And he blogged this about the Berry settlement, this settlement which is before the Court. "CCAF attorney Adam Schulman filed an objection to the horrendous settlement in BERRY v. LEXISNEXIS, which is like DRY MAX PAMPERS, but far worse, with a large class and the attorneys asking for $5.5 million. This merits a longer post but we were honored that a passel of very highly-paid attorneys representing a competing class action and their objectors saw fit to adopt so many of our arguments."

Now, this tells you sort of garbage in, garbage out. Mr. Frank had to get this information from Mr. Schulman, and it is just wrong. He says the Berry settlement is far worse than DRY MAX PAMPERS. We will go through that very quickly. Then he says they are very highly-paid attorneys representing a competing class action. There is no competing class action. He can only be referring to Mr. Kimball Anderson and Mr. Molster there, the Winston & Strawn lawyers, who have been hired by Watts Guerra to come in and argue this objection and presumably take an appeal. But there is no competing class action. In fact, the fee agreement that Watts Guerra has with all of its clients says, "We are not going to do anything until we see what happens with this objection." They have never filed a lawsuit. They don't

intend to. They are hoping, what they were really hoping for, I'm sure, was that LexisNexis would come in and say, "Oh, we will pay you off." That's what they really wanted. They wanted to open a dialogue and get some money and go away. And it didn't happen. So there is no competing class action. There is no one out there pursuing these claims except for the lawyers here who have been pursuing them for five years.

Now, Berry is no PAMPERS or L'OREAL. The PAMPERS and L'OREAL cases, the reason I spend a little time on this, Your Honor, is because these are sort of the white horse cases that are cited to the Court in the objectors's briefs. So they are relying on these cases. They are telling you that Berry is just like PAMPERS and L'OREAL. And nothing could be further from the truth. PAMPERS and L'OREAL were consumer class actions. They involved the sale of low-cost products. PAMPERS obviously involved diapers; the L'OREAL case involved shampoo. Each settled shortly after filing with no discovery. In fact, the PAMPERS Court said, and by the way, Mr. Schulman, complimenting him, he did, I'm sure he did the lion's share of the work on the objection. Mr. Schulman argued that case to the Sixth Circuit and won a terrific victory for him as a young lawyer. I'm sure there will be many more. The PAMPERS Court said: "Counsel did not take a

single deposition, serve a single request for written discovery, or even file a response to P&G's motion to dismiss." The L'OREAL Court noted that the motion for preliminary approval of settlement was filed soon after filing the case. In fact it was filed about a month after filing the case.

Both PAMPERS and L'OREAL proposed class certification of past purchasers' classes. It is really unclear where prospective injunctive relief would benefit class members. For example, in the PAMPERS case, which dealt with diapers and an issue of diaper rash, it went back to diapers that were sold beginning in 2008. There aren't many kids that are in diapers for longer than a couple years, three or four years, something like that. So by the time the PAMPERS settlement came along in 2010 or 2011, most of the people that were buying those diapers no longer needed them. Then of course there is the question of whether they would ever need them again. They would have to have another kid. There was a real question about whether prospective injunctive relief would benefit class members. That's not this case. In Berry, of course, there is no question that virtually every adult in the United States at some point will benefit from the relief afforded by this settlement, because there are 20 million reports issued a year by LexisNexis with respect

to collections. Sooner or later, many, many, many adults in the United States, tens of millions, will be the subject of those reports and will get the benefits of this settlement.

Similarly, PAMPERS and L'OREAL both involved small-dollar actual damage claims, only viable in a class action. In fact, the L'OREAL Court in an opinion issued just last month said they were trivial individual damages. Big distinction between that class and this case. Again, in this case, actual damages can run into the hundreds of thousands of dollars. There is one verdict for $18 million. Both of these cases effectively released non-incidental monetary claims in a 23(b)(2) class settlement. The PAMPERS case explicitly released non-monetary -- non-incidental claims. They released rescission and restitution, which the courts have found are individualized claims, claims for actual damages, and are not subject to being released in a (b)(2) class. The L'OREAL Court, there was a release of the -- there was a waiver of the class action mechanism, similar to this case. The distinction is, however, that in L'OREAL, you only had trivial individual damages. So if you waived the class action device in L'OREAL, you had nothing.

In this case, waiving the class action device does nothing with respect to actual damages claims for two

reasons. One, under the FCRA, I'm not aware of any FCRA class action which pursued successfully actual damages. They are too highly individualized to be pursued in a class action. And two, the big distinction, actual damages claims in an FCRA case are in fact often brought or often big enough, you are not talking about a bottle of shampoo. You are talking about somebody's damage to their reputation. You are talking about the inability to get a job, the inability to buy a house. Those are big claims, and routinely result in five and six figure settlements.

Also, in PAMPERS and L'OREAL, they were, the only changes were label changes. Literally, in the PAMPERS case, it was they were going to put a little reference on the diaper box about diaper rash. And they were going to put something on the website about "If you get diaper rash, talk to your doctor." It was meaningless. In the L'OREAL case, the L'OREAL case was about shampoo that said, "Sold in salons only," and it was being sold elsewhere. So they were for a period of years going to take off the "Sold in salons only." That's it. That was the only change they were going to make. The courts in both cases, the PAMPERS Court said it was nearly worthless injunctive relief, illusory. The L'OREAL Court said, "injunction of limited value."

There was no sea change, there was no earthquake

in those cases. Neither case involved a limited-damages statutory claim like that under the FCRA. Another important distinction.

So in both of those cases you were only talking about actual damage claims.

Actually, and I recommend to the Court the L'OREAL opinion. The L'OREAL opinion actually supports the Berry settlement. If you read the case, first, the Judge in the L'OREAL case, it is clear, felt he wanted to approve that settlement. There are four or five times where the Court said, "On this record, I cannot do it. On the record before me, I cannot do this." That sort of thing. So he is sympathetic. But he goes on to say, and he looks at the WAL-MART v. DUKES case, and he makes the analysis that this Court can make and should make with respect to the Berry case. In WAL-MART, the Court held that claims for monetary relief may not be certified under (b)(2) where the monetary relief sought is not incidental to the injunctive or declaratory relief. Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

The only claim that is being released in this case, the statutory damages claim -- so the only claim that's being released, I'm at Slide 60, Your Honor, the

only claim that's being released here is a statutory damages claim. We are not releasing claims for actual damages. The statutory damages claim, as you have seen, is dependent on a single finding: willfulness. And if willfulness is established, then it is established for the entire class. It is established for everyone. Conversely, if it is not established, it is not established for anyone. So there is no individualized inquiry by the Court in this case with respect to the statutory claim that's being released. And it goes on on the next slide, the L'OREAL opinion again, the Court characterizes the distinction between incidental claims and when damages predominate. Damages claims are incidental when class members would automatically be entitled to damages once liability to the class or sub-class as a whole is established.

If we went through this case and we were somehow able to -- somehow able to obtain a finding of willfulness and we could sustain that on appeal and obtain a judgment, any damages recovered would automatically go to every member of the class. There is no member of the class that would not be entitled to that damage on a pro rata basis. As the Court goes on, he says: "In contrast, damages predominate when the damages that class members could recover would be dependent on the intangible, subjective

differences of each class member's circumstances and would entail complex, individualized determinations."

Now, that's Ms. Nix's case, by the way. That's the mixed file case. That's the case where you've got actual damages. And as the Court would know from these Fair Credit Reporting Act cases, you have to look at the consumer's credit standing, you have to look at their history, you have to look at whether in fact the credit report was a factor in a decision to deny employment or to deny housing, things of that nature. They are highly individualized, highly fact-intensive inquiries. That's not the case with respect to the claim that we are releasing in this case, which is simply the statutory damages claim of the willfulness.

Again, the next slide, the L'OREAL opinion in fact, and Mr. Schulman, the objectors didn't point this out, in fact, the Court goes to great length in L'OREAL to say, "I'm not saying here that you can't have a case where you could settle class action damages and leave individual damages intact under Rule 23(b)(2)." He says that. "It is not necessary here to determine whether permitting plaintiffs to settle the class action damages claim while leaving individual damages claims intact can ever be proper under Rule 23(b)." He goes on to say, "on this record." And that was the problem in that case.

In this case, Berry is no PAMPERS or L'OREAL. The release is only of an incidental statutory claim under the Fair Credit Reporting Act. We have proffered Professor Mullenix's analysis on that. More on Professor Mullenix in a minute. The actual damages claims are fully preserved. The actual damages claims under the Fair Credit Reporting Act are individualized and not susceptible to class treatment. And they are routinely asserted and successfully litigated.

Next slide: The injunctive relief here is a sea change. It is an earthquake. It affects roughly 200 million adult Americans. One point, by the way, that the objectors make that is just again wrong and demonstrates lack of familiarity with the Fair Credit Reporting Act: They claim that only a hundred million objectors would have a claim, and therefore, we've got this intra-class conflict between the 100 million who have reports issued about them and the other 100 million who had their information in the files at LexisNexis Accurint, but didn't have reports actually issued. That's not true. You've got many rights under the Fair Credit Reporting Act with respect to information that is maintained in your file irrespective of whether a report is issued. For example, you've got the right to obtain a copy of your file. You've got the right to correct or dispute

information in your file. So these are rights that every person whose name was in the files at LexisNexis Accurint had that are being resolved by this settlement. So there is no intra-class conflict.

As we pointed out, the cost of implementation: Lost business alone for LexisNexis totals about $11 million. About 20 million reports per year will be affected.

Mr. Schulman made some egregious mistakes. Again, he is young, he is smart, he is a good lawyer, he is going to get better. So I don't mean to be pejorative about this. I was a third-year lawyer once, I made mistakes, I still make mistakes, so I'm not pointing the finger at him. But I think it is important for the Court to recognize that when he says something that's wrong, the Court needs to, we need to clarify the record on that.

Mr. Schulman made a mistake. He didn't read Professor Richards's Declaration in which Professor Richards, and this was filed with our initial papers, our moving papers, he said, "This is tremendous. It is a sea change." He said, "This is of tremendous value to consumers." Here we go. We are back on the computer here, Your Honor. So in his objection, he said, "So far as I am aware, there has been no attempt to quantify the injunctive relief package. There is an absence of

evidence that the injunctive relief benefits class members."

Now, part of the problem was, Mr. Schulman came at this in the context of PAMPERS and in the context of L'OREAL, and he says, "Okay, here is another settlement where the lawyers get money and the class gets nothing." And so, you know, and he didn't even read Professor Richards's Declaration.

Once we pointed that out in our response to the objections, Mr. Schulman, shortly before Thanksgiving, about two weeks ago, filed his objection to attorneys' fees. Nominally about attorneys' fees. The truth is, about half of it was rearguing his objection as to the settlement as a whole. We didn't file anything with respect to that. But he says in a footnote, so kind of buries it, "I apologize to Professor Richards for not realizing that he had filed a Declaration to the value of the injunctive relief." He goes on to say: "However, the entire injunctive package cannot be accurately ascertained and thus cannot be included in the fund valuation." So it is sort of like, "I don't like what he said so you can disregard it." Professor Richards makes his life, he is a very bright guy, makes his life dealing with privacy law, data information, the Fair Credit Reporting Act, and he attests to the value of this settlement. And to say all

of a sudden it is zero because we can't accurately ascertain it is, as the Court knows, just not true. We routinely assess value for things that cannot be accurately ascertained. Just because it can't be precise doesn't mean that it doesn't have value. You don't want to tell a jury, "Oh, well, don't worry about pain and suffering, we can't accurately ascertain pain and suffering so we are not going to assess it. You don't want to worry about loss of consortium. You lost your wife, you lost your husband. You lost that ability to be with them. But we are not going to assess it because it can't be accurately ascertained." Courts do that every day.

The problem Mr. Schulman found himself in was, in his initial brief, his opening brief, he had said that if the injunctive relief was worth $16.5 million, then the fee, the $5.5 million fee that was requested would be proportionate, would be reasonable. He went on a 25 percent benchmark. He said that. He said, "Supposing putative class counsel seek the entire $5.5 million. To reach the appropriate ratio, the class benefit would have to be valued at $16.5 million."

The truth is, as you practice longer, I've learned that one of the most valuable things you can do in terms of maintaining your credibility with a court is to,

when you are wrong or make a mistake, just acknowledge it. Say, "I'm sorry. I apologize, my bad. I didn't see it. I see it now." But he didn't do that.

Professor Richards valued the injunctive relief to be in the billions of dollars. You can understand why, Your Honor. If you've got rights that on a statutory claims basis could be worth $100 to $1,000 and you have 20 million reports issued every year, these are valuable rights. And all of a sudden, people are going to get these rights when they hadn't gotten them before. So Professor Richards said: "To be in the billions of dollars, by another measure to be approximately $160 billion annually, another method produces a figure of $2.2 billion." And then he concludes, "Even at a nominal and unreasonably low amount of $1 per consumer, the value of the settlement to consumers is still in the range of at least tens of millions of dollars per year." And this is a seven-year commitment on the injunction. And the Court knows, big companies are like cruiseliners. They don't turn very quickly. And the reality is, the changes we are making with this settlement are going to continue. And I predict once this happens, other data brokers who do the same thing as LexisNexis will make the same changes. They will have to, because we are going to sue them.

The truth is, the only evidence in the record

before this Court, you know how in the L'OREAL Court the Judge kept saying "on this record," "on this record." Well, on this record, the evidence you've got is that the injunctive relief is worth tens of millions if not billions of dollars to the class. There is zero evidence, nothing presented -- Mr. Schulman could have hired his own expert. The Watts Guerra objectors could have hired an expert if they had wanted to and contested our valuation of the injunctive relief. They didn't do so. So the only evidence you have from anyone qualified to speak on this issue is from Professor Richards.

Mr. Schulman argued that injunctive relief was inappropriate in the settlement per se. I don't want to linger on this. Even the Watts Guerra objectors agree, don't agree with him and say that class counsel's position on this issue is unremarkable. Plaintiffs argue at length that a settlement may include injunctive relief even where the underlying statute does not afford a right to such relief. Even the Watts Guerra objectors don't dispute that.

You know, this is a little, I thought, discourteous. Mr. Schulman, he is the one that brought up Professor Mullenix and he cited to some work that she had done at four different places in his objection and he said, "This violates this and violates this and that." So

we went to Professor Mullenix and said, "Did you really mean this?" She says, "No. Mr. Schulman misinterpreted my thesis." We misspelled Mr. Schulman's name there. It was not intentional. "Mr. Schulman misinterpreted my thesis, quoted me out of context, and plucked selective sentences to support his argument, with which I do not agree." And Mr. Schulman, rather than acknowledging the error, he simply said, "Well, pay no attention to her." He was the one that proffered her position to the Court. So she certainly should be allowed to correct the record and make it clear. Her position is, the waiver the statutory damage provision and the class action waiver provision in Berry are supported by existing precedents and do not constitute violations of the due process rights of class members. In effect, she found that these were incidental to the injunctive relief in the settlement.

This is a mistake that both Mr. Schulman makes and the Watts Guerra objectors make. They treat all FCRA statutory damages claims as the same. They don't -- I really attribute this more to lack of experience with the FCRA -- they don't to any analysis of the circumstances at issue. They don't do any discussion of the willfulness issue. Zero. Zero. And that's the whole issue. The whole issue in this case with respect to statutory damages is willfulness. And they don't address that at all. And

yet, without willfulness, you can't get a statutory damages recovery in this case. And as you have seen, that is a significant if not fatal problem for the plaintiffs in this case.

There was no -- well, I won't repeat that. Again, the vast majority of damage claims under the FCRA for mixed files, failure to delete aged information, failure to update account status in which the proof is individualized, these claims are all preserved by the settlement. We recently settled a case with Mr. Bennett in Georgia, in Atlanta, before the federal judge there, and we got a recovery for our individual clients, $200,000. That was an actual -- single actual damages claim. I mean, these claims are valuable. And they are not being released by this settlement.

Mr. Schulman opined it is likely that the lawyers obtained some compensation for themselves in the ADAMS and GRAHAM actions. In the ADAMS case, the fees that were compensated were excluded. In the GRAHAM case, if Mr. Schulman had looked at PACER, he would have seen the claims were dismissed against LexisNexis and there was no settlement. We didn't get anything. We dismissed it because we recognized that GRAHAM was not the proper vehicle for these claims, and we waited. We dismissed the case voluntarily, and then went and pursued this case, the

Berry case, with different class representatives.

Again, Watts Guerra, they try to liken this settlement to L'OREAL. The important language here is, in the middle, where it says "Preserving," this is a quote from L'OREAL, "Preserving individual damages claims here does not help plaintiffs. In consumer actions such as this, damages are typically far too low for a rational plaintiff to pursue an individual action, greatly increasing the value of the aggregation procedure in Rule 23. The class action claim is essentially the only way absent class members could ever recover any damages here."

That's not this case. The actual damages claims that are not being released in this case are very valuable and can be pursued. But, interestingly enough, and this is, I think, important for the Court to note: In its history, Accurint has been sued only a handful of times over its reports. Now, you might ask why. Maybe they just do such a great job. And I'm sure that's what they would tell you. But it may also be because people don't even know they are out there. Because they don't follow the Fair Credit Reporting Act, people don't get notice, people have no idea. Like Ms. Nix. Ms. Nix was lucky enough to get a couple bill collectors to say, "Hey, we got your name from Accurint." So she called Accurint. But most people don't even know. So there is not

some -- I don't want the Court to think there is some avalanche of litigation that we are releasing in this case. In its history, LexisNexis has only been sued a handful of times, less than a handful. But now, going forward, people will have notice, people will have rights. Going forward, those rights become much more meaningful. And damages will be significant.

Again, recoveries are routinely 5 to 6 figures. There was a verdict in Washington State against, I want to say it was Experian --

MR. BENNETT: It was OREGON v. EQUIFAX.

MR. CADDELL: A lot of that was for punitive damages but it was for $18 million for a single person. These are not claims that need the class action device. As I noted and as the Court is aware, there have been hundreds of FCRA accuracy and reinvestigation claims prosecuted in this district and in this division alone.

There were objections to the (b)(2) settlement by the supposed -- there was a claim that because we are expanding the class, we somehow have a problem with adequacy. The reality is, the class was expanded to comprise everyone who will benefit from the settlement and explanations are not prohibited. And they don't cite any authority to the contrary.

Basically, what they cite, and Mr. Schulman does

a good job of this, basically what he cites are cases that stand for the proposition that if you settle a case pre-class certification, pre-litigated class certification, the Court needs to undertake its responsibility seriously to examine it to make sure that the settlement is adequate and fair. And I know the Court will do that. So I don't have a quarrel with that. He also cites cases for the proposition that if you have injunctive relief, so that the class is receiving no money, direct money, and the lawyers are getting substantial fees, you need to look at that very carefully. I don't disagree with that, either. I think he is dead-on on that. I've argued the same thing in other cases.

So we don't have a problem with the approach. We have a problem with the lack of, frankly, the follow-through. And so in this case, the people who are in the class are the people who are going to benefit from the settlement.

Your Honor, it is clear that injunctive relief is available to private parties under the FCRA by consent. That's been established some 30 years. It is the parties' agreement that serves as the source of the Court's authority to enter any judgment at all.

I'll put it a different way. Parties can contract. In this case, what you have before you are

effectively two private parties. You have LexisNexis Accurint, and you have the class. And we have contracted for injunctive relief. Now, the Court has a duty to supervise that settlement and to ensure that the class is protected. The Court is the guardian of the class. And that's absolutely what the Court should be doing. But it is, if the Court determines that it is fair, there is nothing to preclude the Court's approval of a settlement which provides for injunctive relief irrespective of the fact that even if the Court believed that the Fair Credit Reporting Act itself did not afford that right. We can still privately contract for that.

By the way, there are cases which do not agree that the FCRA does not afford or precludes my possibility of injunctive relief for private litigants. The HARRIS case, which went up on 23(f) review and the Fourth Circuit denied it, the Court concluded it had not been divested of authority to issue injunctive relief in the case. "Precise fashioning of that injunctive relief, should the Court decide such relief is appropriate, will await further proceedings." So it is not as clear as they would make it seem. We have many cases, our firm, Mr. Bennett, Mr. Francis, the same thing. These are just a brief selection. These are cases where we are either seeking injunctive relief or where we obtained injunctive relief.

As you can see, all over the country: North Carolina, Wisconsin, Georgia, Nevada, Virginia, California. This is not novel.

Now, there is also an argument that our complaint does not include a claim for injunctive relief. Well, of course, injunctive relief is a remedy. It is not a claim per se. Your claim is under the Fair Credit Reporting Act. Injunctive relief is a remedy for your claim. Rule 54(c) makes it very clear that, and this is, by the way, when it says, "Every other final judgment," what that's a reference to is in a default judgment under Rule 54(c). In a default judgment, of course, the Court's judgment has to conform to the pleadings. But "In every other final judgment, the Court should grant the relief to which the party is entitled, even if the party has not demanded that relief in its pleadings." So the Court is not bound by the pleadings in this case. Now, having said that, we did file an amended complaint which does state a claim for injunctive relief.

MR. BENNETT: Your Honor, that was one of the slides that we inserted this morning.

THE COURT: I see that.

MR. CADDELL: Sorry, Your Honor. Amendments are routinely allowed: There is a plethora of cases where amendments conforming requested relief to the settlement

agreement are filed contemporaneously with the settlement agreement. This is an example, the IN RE: CURRENCY CONVERSION case out of New York. These are cases where we have done it. Most recently, for example, in the second case there, the IN RE: NAVISTAR case, Judge Kennelly, Matt Kennelly out of Chicago, we had a national class, over a million Ford diesel engines, a very successful case. We filed an amended complaint when we filed the settlement to conform the pleadings to the settlement. These are other cases, other examples of that.

Here is the question to ask the objectors: What are you going to tell Ms. Nix; how are you going to help her with her problem? The $300, she is getting more money than the Watts Guerra objectors have settlement authority for. She is going to net $325 or more, which is $100 more than the Watts Guerra people got in TRANSUNION. The 443 that they have agreed to or that they've gotten settlement authorization, if they got that, they get 45 percent of that. Their clients would only get $200. She has already said, "That's not enough. I don't want the money. I want the problem fixed. This settlement, I want my phone to stop ringing. I want to stop receiving calls for a person I've never heard of. I want LexisNexis to stop giving out incorrect information and refusing to correct their mistake." That's what this case is about. That $100 or

$200, that's not going to make a meaningful difference to people who are harassed by bill collectors, who have inaccurate information in a credit report that's being issued about them. Where decisions are being made. That's what they want. They want this fixed. This is a screenshot, Your Honor, of the LexisNexis website yesterday. I guarantee you, if the Court called it up today, it would say exactly the same thing. You can see what we've got. "Accurint for Collections does not constitute a consumer report as that term is defined in the Federal Fair Credit Reporting Act. Accordingly, Accurint for Collections may not be used in whole or in part as a factor in determining eligibility for credit, insurance, employment, or another permissible purpose under the FCRA."

The problem is, when it says it does not constitute a consumer report, that means you don't get any of the rights under the fair Fair Credit Reporting Act. And if this settlement is not approved, that won't change. And the people who have been affected by this practice all these years will continue to be affected without a remedy. This is not a warning about diaper rash or taking "Salon Only" off a bottle or something like that. This is a massive change for people. And it will have a meaningful impact on millions of people across this country.

I'm not going to spend a long time on attorneys' fees, Your Honor. There is no objection as to the percentage of the monetary relief fund, which actually, the agreement provided we could seek up to 30 percent. We are only seeking 25 percent. There is no objection to that. Only Mr. Schulman has filed an objection to the $5.5 million in fees for the prevailing party with respect to the injunctive relief settlement. Our focus has always been on injunctive relief. I think you can tell from my presentation today, that's what the thrust of the case has been about. We used statutory damages as a lever to achieve the injunctive relief. That's what people want. And that was our goal from the beginning. Again, there is no amount of money that we could recover for a class the size of 100 million or 200 million that would be meaningful. The most meaningful thing we could do for people would be to obtain for them injunctive relief. So at least 80 percent of our time was dedicated to injunctive relief. Mr. Schulman said in his objection, one of the things he said was, in fact, this is in his supplemental objection, he said, "There is no attempt to quantify how much time was spent, no independent basis on which to quantify how much time was spent on seeking injunctive relief versus the monetary relief." Well, in fact, Professor Miller did just that. He looked not only

or listened not only to what we told him, but he looked at the pleadings, he looked at the -- by pleadings, I mean the briefs we submitted back and forth in the cases. He looked at our mediation briefs. He looked at the mediation presentation. He looked at the presentation made to Magistrate Lauck a year ago. And it was clear from looking at all of that that the focus of the litigation was on injunctive relief, not on the monetary relief. And it should be. The injunctive relief affects tens of millions of people. The monetary relief affects 31,000.

In fact, we didn't really discuss in any meaningful way, other than sort of a placeholder, "By the way, we think some monetary relief is needed," we didn't really negotiate monetary relief until we finished negotiating or had an agreement in principle or an understanding on the business practice changes. That was where we spent virtually all of our time until we got that part of the puzzle solved, which was huge and was only accomplished by the, maybe the second session or middle of the third session with Randy Wulff, with Mediator Wulff in Oakland. Again, this is more of the same. We have always been focused on injunctive relief, Your Honor.

Mr. Schulman argues that the common fund is only $5.5 million. Again, you only get there if you totally

ignore the value of the injunctive relief.

We submitted expert opinions. We submitted declarations to support the reasonableness of our hourly rates. The Fourth Circuit has specifically found that was appropriate. Our rates have been approved -- by our rates, I mean Caddell & Chapman -- our rates have been approved by the U.S. Department of Justice, by judges all across the country, federal district judges all across the country. A little over a month ago, in a fairness hearing, final fairness hearing before Judge Margaret Morrow out of Los Angeles in a national class, against Honda, they issued a tentative approving rates of $875 for me, $675 for Ms. Chapman, and specifically found that class counsel had many years of experience in consumer class action litigation, and the specific causes of action asserted in this case.

Similarly, the U.S. Department of Justice approved the rates that we are seeking in this case.

Our rates are reasonable for complex class action litigation. They are higher rights. Complex class action litigation is not the same as doing a consumer litigation on a case-by-case basis. These cases take a lot of resources, both financial and in terms of lawyers. They take a lot of experience. I've been doing this, I've been doing national class actions now for 20 years. And

it is amazing what I have learned. In our firm the learning curve has been tremendous over the last 20 years.

In this district, and this is a counter to, we saw Mr. Schulman's filing about two weeks ago --

MR. BENNETT: This is a new slide, also.

MR. CADDELL: This is a new slide. And we are going to provide copies. We just did it this morning, so we will provide copies to Mr. Schulman and Watts Guerra and to the Court. But the reality is, and I've got -- in fact, we've got copies of these we could -- don't we have copies of these?

MR. BENNETT: We do.

MR. CADDELL: Your Honor, we have two declarations that were filed in the Eastern District by attorneys.

MR. BENNETT: I gave the other side copies before the hearing.

MR. CADDELL: You did. Good. These are declarations that were filed. I was gratified to see, by the way, that both of these lawyers, Mr. Reilly and Mr. Angle, are UVA graduates. But these, the first, in the IN RE: MILLS case, this is a -- well, no, this is a separate case. The IN RE: MILLS case, Judge O'Grady approved counsel rates ranging from $440 to $825 per hour. That was four years ago. In the SUNTRUST case, Judge Payne

approved counsel rates of $695 an hour. In these cases, the declarations submitted by Mr. Reilly and Mr. Angle support the rates as high as $820 an hour for Mr. Reilly, and this was several years ago, and for Mr. Angle, and by the way, that $820 an hour for Mr. Reilly was for a lawyer with 20-plus years of experience. I've got 34 years of experience. And then Mr. Angle was submitting some rates that were as high as $848 an hour to the Court.

So there is ample support for the rates submitted in this case and sought by class counsel.

Mr. Schulman relies on the PERDUE case for a good part of his objection. We have looked at the PERDUE case. In fact, if we go back just a second, in this qui tam case against DAVITA that we had and settled and was resolved last year, the Department of Justice, we were getting a multiplier on our fee in that case, the DAVITA case. The Department of Justice came back and said, "Hey, wait a minute, what about PERDUE?" We went through an analysis with the Department of Justice over PERDUE, and ultimately they agreed that PERDUE did not preclude in that DAVITA case our receiving a multiplier for our efforts on our lodestar. And part of it is what the analysis we laid out here. Part of what was motivating the PERDUE Court, the U.S. Supreme Court in PERDUE, was, and this is a quote, "Fees are paid in effect by state and

local taxpayers." That's not the case here. Defendants are going to pay all the fees in this case. In PERDUE, the PERDUE case involved a contested fee. It was a Georgia case brought against a municipal regulatory agency, and it was contested. In this case, the fee is agreed to by the defendants. The fee-shifting statute was the only basis for fees in PERDUE. In this case, common benefit provides an alternative basis for the fee. You can see we referenced the CLARK v. EXPERIAN case. We can provide a copy of that opinion if the Court would like to see it. It awarded fees in a Fair Credit Reporting Act case as a percentage of common fund. That was Judge Currie, Cam Currie, in South Carolina. She did a lengthy analysis, and in fact, in that case, the issue of fee shifting statutes and whether that would limit the multiplier was expressly raised with her and expressly dealt with in her opinion.

And I would point out, ironically, when it says, "Common benefit provides alternative basis for fees," Mr. Schulman in his initial brief argued that we should really not look at the lodestar, we should look at the common benefit. And you may recall a few minutes ago I showed you the slide where Mr. Schulman said if we want $5.5 million, then the value of the injunctive relief has to be at least $16.5 million. Well, guess what? It is a

lot more than that. It is many multiples of that. So there is an alternate basis for awarding the fees other than lodestar.

Even if you followed PERDUE, PERDUE allows enhancement for superior results. This is a direct quote: "We reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances."

The Fourth Circuit post-PERDUE has said, "After the lodestar is calculated, however, the Court or agency adjudicator may adjust that figure based on other factors." Again, that's in a litigated context, not in a settlement context, which I propose makes a significant difference.

Last couple of points, Your Honor. Sub-classing is unnecessary because every class member is going to get the identical relief. And the service awards, Mr. Otten, for example, they are reasonable compared to the relief provided to class members --

THE COURT: Let me ask you a question before you go on. You just said that you thought in a settlement circumstance, that the Court's ability to deal with the reasonableness of a multiplier in the fee is somehow different or changed. What's your point there? Because I

have actually been thinking about that. I would like to hear your --

MR. CADDELL: My point is that if you have a settlement and the defendant has agreed to pay a certain fee, and I think it is important that that fee be negotiated after release for the class was negotiated, and it is also important to recognize that that fee is going to be paid by a private litigant, not by a governmental agency, where there is an issue about the taxpayers being on the hook for that fee later on. I think in that circumstance, the Court has more leeway, frankly. I don't think the Court -- I think parts of the PERDUE analysis simply don't apply. Part of what was driving PERDUE was that this was a litigated fee. It was contested. And so if you've got a contested fee, you have to sort of sort through who is right and who is wrong.

Your Honor, we have already had a contested fee with LexisNexis. You weren't there. Mr. Wulff was. Because it came at the end of the mediation process. But we were quite vigorous in our disagreements over what would be an appropriate fee. And LexisNexis looked at the work that was done. We had specific discussions of the items that this Court would look at, that Mr. Schulman is talking about, the work performed, the rates, whether we should be allowed to consider the work done in the ADAMS

case or in the GRAHAM case. All of these issues were aired. All of these issues were discussed and negotiated, sometimes with great heat. And ultimately, we reached an agreement. And the problem is, of course if at some point the Court concluded that the amount that was agreed upon was way out of proportion to the relief that was being obtained, or if the Court believed that there was some collusion going on, then the Court has a duty to investigate and to make changes, to address that issue. But in the absence of collusion, and in a situation where class relief was determined before any discussion of fees, and in a situation where the class relief is in fact a many-times multiple of the fees sought, I think for the Court then to do a PERDUE analysis on the fees really puts the Court in a position of second guessing the parties. Because it is a private negotiation just like any other negotiation.

And so believe me, Your Honor, we didn't start at $5.5 million. LexisNexis didn't start at $5.5 million, either. So my point is, that was, it has already been vigorously contested, and all of these issues have been aired, and this was at the end of the day something that was agreed upon and does not affect in any way the relief to the class. And again, I think the Court -- so I think for the Court, the real questions are, is there any chance

of collusion; is this relief disproportionate to the relief being given -- I mean are these fees disproportionate to the relief being given to the class; were the fees negotiated after the relief to the class was determined.

THE COURT: All right. Thank you.

MR. CADDELL: Thank you, Your Honor. Your Honor, I wanted to see, if I may check with my co-counsel just a second.

(Counsel conferring with co-counsel.)

MR. CADDELL: Your Honor, a couple of minor points to clean up. One, I would refer the Court to docket 103-1, that's the Declaration of Professor Jeff Miller from NYU. Mr. Miller actually was cited, I think, by both objectors, but I know at least by Mr. Schulman, I believe, and he did a report on fees and multipliers and in his Declaration, Paragraph 36 through 40 he goes through in great detail and justifies the multiplier that's being sought in this case.

I would go back and looking at the value of the settlement on a very simplistic level, we are talking about 20 million reports a year. Consumers, because of this settlement, will have the right to a free copy of their credit report on an annual basis from Accurint. And not just the Accurint for Collections report, but also the

Accurint Contact & Locate Report. Those typically cost, if you buy your credit report, it typically costs $10 to $11. About ten percent of consumers request their credit reports on an annual basis, because they want to know what's out there about them. If you just did the math on that alone, you could pick almost any number, 2 million, 10 million, 5 million, the value on an annual basis to this class of the rights that are being afforded by the injunctive relief are many, many times multiple of the fees being sought in this case.

And I would emphasize in that regard, again, the difference between this case and the PAMPERS and L'OREAL cases. If you look at those cases, they were filed and settled very quickly. Again, the PAMPERS case, no discovery. They didn't even issue a single written discovery request. No depositions. We have been pursuing this litigation for five years, since 2008. We have believed for five years that this was a huge problem for people that was under the radar because LexisNexis took the position that this product was not subject to the Fair Credit Reporting Act. And this settlement will bring that to the light of day and provide millions of consumers, tens of millions of consumers with rights that they never had before. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. CADDELL: Your Honor, I would like to, if I could, I know we have tendered it, but we do have a couple of extra slides that we did this morning that we need to make copies of to give to the Court. I'd like to give the Court one copy that's complete if I could, and of course we will make that available to the objectors as well.

THE COURT: Sure.

MR. CADDELL: And then we already handed the Court, I don't know if the Court, just for ease of the record, could we mark these as exhibits? I guess what I would do is mark four documents as exhibits. The PowerPoint as Exhibit 1; the Nix objection as Exhibit 2; and then the Reilly Declaration as Exhibit 3; and the Angle Declaration as Exhibit 4.

THE COURT: All right.

MR. CADDELL: Then we will provide everyone a copy of the slides that were not -- that were added just this morning.

MR. BENNETT: Your Honor, we will give the court reporter copies informally.

THE COURT: The most important person is the Clerk needs copies of these identified exhibits. All right, let's do this: Let's take about a 15-minute break. We will come back in and finish whatever you want to add, and then we will take luncheon recess and come back and

finish up.

(Recess taken from 12:18 p.m. to 12:35 p.m.)

THE COURT: All right.

MR. CADDELL: If I might just correct one thing. I misspoke. I said Mr. Francis and Mr. Bennett had both testified before Congress with respect to the Fair Credit Reporting Act. Mr. Francis has not. He has testified to the Consumer Financial Protection Bureau, but not to Congress. Mr. Bennett has testified to Congress.

THE COURT: All right.

MR. CADDELL: Just a housekeeping matter, Your Honor, if you wondered, I didn't want it to be a distraction, but I fell at my daughter's school last week. We served burgers to the kids, about 600 kids and students, and so last week I fell and cut myself, so I don't really have -- that's not normally the way I look. But I didn't want it to be a distraction.

THE COURT: I didn't notice at all.

MR. CADDELL: Thank you.

THE COURT: Defendants?

MR. McCABE: Good afternoon, Your Honor. I'm Jim McCabe representing defendant LexisNexis in this matter.

I want to, I hope my remarks will be brief. I want to focus on one half of one of the issues that the

Court must address in ruling on the motion before it. What the Supreme Court has said about the motion to approve a class action settlement is that the courts judge the fairness of a proposed compromise by weighing the plaintiffs' likelihood of success on the merits against the amount and form of the relief offered in the settlement. That's the CARSON v. AMERICAN BRANDS case, 450 U.S. 79. What I want to focus on here is the likelihood of success on the merits, because the value of the settlement, I believe, is adequately covered by the submissions of the parties and will be dealt with by others this afternoon.

This case asserts only claims for willful violation of the Fair Credit Reporting Act. That's the only claim in the case. Willful violation of the Fair Credit Reporting Act in the sale of Accurint reports. One specific report, one law.

To prevail on those claims, as Mr. Caddell said earlier, the plaintiffs would have to prove two things. They would have to prove, first, that Accurint is a consumer report within the meaning of the Fair Credit Reporting Act. That's number one. That's not enough. They would have to also prove that at the time of the sales that were complained of, it had been clearly established as a matter of law that Accurint was in fact a

consumer report. That's the willfulness element of the case. That comes from the Supreme Court's decision in SAFECO INSURANCE COMPANY v. BURR, a case which is not discussed by either of the objectors to the settlement.

Without establishing both of those points, the plaintiffs would have no recovery here. And were this case litigated, the likelihood of success on the merits, were this case litigated, the plaintiffs could not establish either one of those points. They could not establish that Accurint was a consumer report. Consumer report is defined in the Fair Credit Reporting Act, it is in 15 U.S.C. 1681(a)(D). That's a very long, I believe it is a 90-word sentence with six dependent clauses. It is circular. It has uncertain internal references, one to another. It is, quite frankly, a mess. It is not a clear statute. And that's significant for the SAFECO analysis.

We can, however, understand enough of it to know that consumer report embraces reports of certain kinds of information, what Mr. Caddell referred to as seven factor information, reports of certain kinds of information that are intended to be used by users to make certain kinds of eligibility decisions. Reports that are intended to inform decisions on eligibility for credit. It is a credit report. Equifax, TransUnion, Experian. They prepare reports so lenders can make decisions about loans.

Those are consumer reports because they concern eligibility for credit.

Eligibility for insurance is another qualifying definition, qualifying element of the consumer report definition. An underwriting report that may be procured by an insurance company before deciding to how much to charge someone for insurance, that is a consumer report within the meaning of the FCRA. A background screening report, eligibility for employment, qualifies as a consumer report under the Fair Credit Reporting Act. But the hallmark of the consumer report definition is that the report must contain seven factor information and it must be prepared for the purpose of determining a consumer's eligibility for something that the consumer wants. Eligibility for a benefit. Credit, insurance, employment, and certain other benefits that are mentioned in the statute.

Accurint reports are not prepared for eligibility determinations. Accurint report users have to agree that they won't use Accurint reports to make eligibility determinations. It is part of the deal. And you can see that deal reflected in the slide that I showed marked Number 86 that Mr. Caddell used earlier. 88 on the current Declaration. You see that in the highlighted portion, it says, "Accurint for Collections may not be

used in whole or in part as a factor in determining eligibility for credit, insurance, employment, or another impermissible purpose under the FCRA." That's the whole point. LN goes out of its way to make sure that its users do not use Accurint reports to make eligibility determinations. That in and of itself establishes that they are not consumer reports.

We are confident that if this issue were litigated, the plaintiffs would not be able to establish the first of the two essential elements they would have to establish in order to obtain any recovery in this case at all.

But even if they could win on that consumer report characterization, they could not win on the willfulness point. And the willfulness is established in the SAFECO INSURANCE COMPANY v. BURR case, 2007, United States Supreme Court. In that case, the Supreme Court established a kind of a threshold for the kinds of violations of the Fair Credit Reporting Act for which willfulness remedies may be available. And in establishing that threshold, it looked to qualified immunity case law under Section 1983, 42 U.S.C. 1983, to draw the line between conduct that may be wrong but hasn't been fully examined, and conduct that clearly violates the Constitution. In the 1983 context, a government actor can

be liable for the violation of a clearly established constitutional right. They can't be held liable for the violation of a right if it is not clearly established. The goal there is to permit government actors a wide range of latitude in the conduct of their affairs, but to say once this conduct has been clearly established as wrong, you can't do it, you can be held liable. You no longer have immunity. The FCRA has a similar taxonomy of violations. If a requirement of the Fair Credit Reporting Act is clearly established, willfulness penalties are available. If it is not, plaintiffs can still get damages but they can't get statutory damages, they can't get punitive damages, they can't establish a willful violation of the Fair Credit Reporting Act.

And the Court in SAFECO described how it is an FCRA actor can know what they are supposed to do, what kinds of obligations are clearly established and what are not. You could have a crystal clear statute. That obviously would be good enough. But what the Court says, and it does this really by negative inference here, it says that this is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission that might have warned it away from the view it took. In other words, with an unclear statute, if a Court of Appeals interprets

it and says this is what is required, and the actor then goes ahead and violates what the Court of Appeals says is required, they can be liable for willfulness remedies under the Fair Credit Reporting Act. But in the absence of that kind of guidance, in the absence of Court of Appeals guidance, in the absence of FTC guidance, with an unclear statute, the actor simply cannot be liable for willfulness remedies under the FCRA. It is stated here in the text of the opinion and it is stated in Footnote 20 of the the SAFECO opinion as well.

Now, in this case, there is no court of appeal anywhere that has said that Accurint is a consumer report. No court of appeal anywhere. There is no agency. The FTC has never said Accurint is a consumer report. So to this day, even if Accurint is a consumer report and LN fails to afford some of the rights to consumers that would be required by the Fair Credit Reporting Act, they could be liable for damages, but they can't be liable for the willfulness remedies, because the law has not as yet been clearly established. And it is actually, from the defense perspective, it is far better than that. The FTC has not been silent on Accurint. It has not simply failed to say that Accurint is a consumer report. The FTC has affirmatively said that Accurint is not a consumer report. And it did so in circumstances that we have described in

our papers, but I'll recount them for you briefly. In 2005, there was an incident in which hackers gained access to the computer systems of some of the Accurint subscribers, and they got logons and passwords and they logged in and started to obtain Accurint reports. Some of these were police departments, law firms, debt collectors, all kinds of folks. And eventually, Lexis figured out what was going on and reported this to the FTC to tell them that this had been happening. The FTC started an investigation, because it could, it had the ability to enforce the FTC Act with respect to Seisent as that unit was then called. And at the end of the day, they gathered some facts and filed a complaint against Seisent and LexisNexis, Seisent and REIT, and they filed a consent order on the same day. It was a package deal after their investigation. What they learned in their investigation, they got very familiar with what was going on at Seisent. They knew exactly what the products were, what Accurint consisted of, knew exactly who they sold it to. They said in the complaint, "Seisent has been in the business of collecting, maintaining and selling information about consumers. Among other things, Seisent sells products that customers use to locate assets and people, authenticate identities, and verify credentials, collect, verification products." This is referring to Accurint.

And the FTC knew exactly to whom Seisent was selling Accurint reports. It said in the complaint, "Respondent Seisent sells verification products under its Accurint trade name, collectively Accurint Verification Products. Accurint Verification Products customers include insurance companies, debt collectors, employers, landlords, law firms, and law enforcement and other government agencies."

So in 2008 when this complaint was filed by the FTC, they knew what was in Accurint, they had been investigating it, they knew exactly who it was sold to, they knew it was sold to debt collectors, which are the very facts that the plaintiffs contended here give rise to the consumer report characterization. They say, "Because you are selling seven factor information to debt collectors who may use it to decide who to collect from, that's a consumer report." That's their argument. FTC heard the same facts. FTC at this time was the agency principally charged with the enforcement of the Fair Credit Reporting Act. They were the boss. They came in, filed a complaint about Seisent's conduct, and they published their consent decree in the Federal Register for comment by the public. Well, the consent decree did not obtain any civil penalties at all. It asserted only a claim for violation of the FTC Act, Section 5 of the FTC Act. So it drew a comment. The Epic Electronic Privacy

Information Center, public interest group out of Washington, D.C., filed a letter, a comment on the settlement criticizing it, saying, "Look, FTC, you settled with this data broker and you didn't get any penalties out of them." And Epic compared the settlement with Seisent to a prior settlement with a consumer reporting agency where the FTC had obtained penalties. They said, "Look, in the ChoicePoint matter, you got penalties but in this case you didn't. You should revise the settlement to obtain penalties."

And the Commission wrote back. This is a formal comment. The Commission as a part of its process had to consider and determine what to do about the comments with resect to the consent order, the proposed consent order. The Commission sent a letter back in July of 2008 saying, "Your comment notes that civil penalties were included in the Commission's settlement with ChoicePoint, Inc. The ChoicePoint case involved credit reports and thus alleged violations of the Fair Credit Reporting Act which authorizes civil penalties. Unlike that case, the current matters do not involve credit reports. In other words, Accurint is not a credit report. And because Accurint is not a credit report, we can't get an FCRA penalty."

Now, this is not some idle speculation from a clerk in the basement of the Federal Trade Commission.

This is a letter which was issued by the Commission following a vote of the Commission, a four to zero vote of the Commission. It could not be more authoritative. The agency that was principally charged with the enforcement of the Fair Credit Reporting Act in July of 2008 responded to criticism of a settlement by publishing in the Federal Register a statement authorized by the Commission stating that Accurint is not a consumer report.

So it is not simply the case that there is no statement that Accurint is a consumer report. There is an affirmative statement that Accurint isn't a consumer report and it comes from an agency that is entitled to deference in its interpretation of the Fair Credit Reporting Act.

Now, there has been some talk about the ADAMS case in 2010 and the fact that the District of New Jersey, Judge Bump, the Judge in the District of New Jersey, denied a motion for judgment on the pleadings in that case that was directed at the question of whether Accurint consisted of a consumer report. It has been widely misinterpreted by, at various times by the plaintiffs in this case and most recently by the objectors. After Judge Bump denied the motion, denied the motion for judgment on the pleadings, we brought a motion for reconsideration because she had relied on a case that had been vacated by

the Supreme Court. We went back and saw Judge Bump again. There was a long argument in her courtroom in Camden where we argued that in fact, Accurint was not a consumer report. And having been very patient, as patient as the Court has been with me today, Judge Bump interrupted me and said, "Okay, listen, it is going to come as a surprise to you, but I agree with you on this." She explained that the reason she had denied the 12(c) motion was that she was uncertain that the July, 2008 letter from the FTC was the FTC's last word on the topic. She thought discovery should be permitted to be sure the plaintiffs could discover any subsequent statement by the FTC that might have contradicted the July, 2008 statement. She said, this is set out in our brief, Docket Number 99 at Page 21, there is a long quote there from the transcript of that hearing. She said, "What if discovery," and this was her concern, "What if discovery shows that the FTC, I forget what it was called, statement, let's just call it a statement, that the defendants relied upon, let's just pretend that the FTC statement was overruled by the FTC a month later. I don't know. And the Court is not in a position at a judgment on the pleadings stage to question the averment." She goes on to say: "At the end of the day, if what you say is so, that there is no other contrary authority to the FTC statement, then it seems to

me summary judgment will be entered in the defendants' favor."

ADAMS doesn't help the objectors here. Didn't help the plaintiffs, and doesn't help the objectors. It has not been conclusively established that Accurint is a consumer report. And so the failure to treat it as a consumer report is not a willfulness remedy-eligible violation of the FCRA.

Now, I can tell you, Your Honor, that this was a point of contention. We raised this point with the plaintiffs in the settlement negotiations and we advised them at that time that had we not settled the matter we would have filed a summary judgment motion within a matter of days following conclusion of that negotiation. And we would not do that lightly, we would not do it unless Mr. Anthony and Mr. Raether and I all were convinced that the Court would grant that motion, that the Fourth Circuit would affirm the Court's grant of that motion. So when we come to looking at the merits of the case, we can say, as the plaintiffs have demonstrated, the value of this settlement is really quite substantial. But it far outweighs the value of the claims, which is virtually nil. So this is a good deal for consumers. They frankly have gotten far more than the case was worth with this settlement. Thank you, Your Honor.

THE COURT: All right.

MR. RAETHER: Your Honor, Ron Raether for defendant LexisNexis. I'm just going to take a few moments of your time, Your Honor, to summarize, I think, a few points that we want to highlight in terms of the one JIFFY LUBE factor that Mr. McCabe's argument, I think, relates to as well as the points that I intend to make. And that is the circumstances surrounding the litigation. Where was the litigation, where were the parties at the time that we were engaging in this contentious mediation that resulted in the settlement that's being considered by the Court today.

Your Honor, you have to realize that we were really dealing with three issues at the time that we were looking at mediation and possible settlement of this case. The first two Mr. McCabe has discussed at length. The first one being is Accurint, does it meet the definition of consumer report. The second issue being, even if it did, were plaintiffs able or are plaintiffs able to establish a willful violation of the FCRA? In other words, was our client's interpretation of the Fair Credit Reporting Act as to not being inclusive of products like Accurint objectively unreasonable.

And Mr. McCabe has done an excellent job of explaining to the Court, reiterating, I think, a lot of

arguments we made in our papers as to why the plaintiffs had a tremendous amount of weakness, I think, with respect to both of those issues. In fact, Your Honor, I can tell you that during the presentation today, as well as during the preliminary approval hearing, I had to restrain myself not to stand up and object a couple times in terms of plaintiffs' continued characterization that Accurint somehow meets the definition of consumer report. And I say that because that was an issue that was divisive in the mediation and the settlement.

I think that if you were to have a bug in the room listening at the time, you would find that even when we, at the end of the day, came to terms on the settlement agreement, we obviously have not come to agreement in terms of what is meant by the definition of consumer report. That was an issue of contention in the mediation. It obviously was a point that we were trying to wrestle through and work out. How do you settle a case like this where there is this unresolved issue, where for the last four years, in essence, our client has had to defend at least in three cases the legal question as to whether Accurint met the definition of consumer report.

And from our position, Your Honor, we would say that we succeeded in ADAMS, we succeeded in the case brought before this Court, and we thought we would succeed

in Berry as well. But, of course, there is the possibility and likelihood that there will be -- would be a fourth case filed. And so if you think about settlements, Your Honor, and you think about those facts that I just explained, what is LexisNexis, what was it looking for in terms of a settlement? It was looking for finality, finality on this issue in terms of whether Accurint meets the definition of consumer report.

So the third issue that we were struggling with, at least one, I think, I think it is safe to say on both sides of this case, how do you settle a case with approximately 100 to 200 million people when you have this lack of certainty, when you have this dispute, when you have this possibility of this issue going on and on and on. That's essentially what we were negotiating over in the mediation. So when it was said earlier that we spent three days talking about the injunctive relief, how it is that we would address this issue and do so in a way that provides finality for my client, but also provides the protections that plaintiffs' counsel intended and wanted to achieve through the filing of this litigation, when you took those two competing interests, and they rammed against each other in the mediation process with the supervision of judges, the supervision of a nationally-known mediator, when those two competing

thoughts, when they collided, that was the result. That ended up creating the injunctive relief that Your Honor is now considering.

And I think that's important, because the objectors want to suggest that this is something that LexisNexis presented to the plaintiffs and said, "Take it or leave it." That's not the case, Your Honor. I think that if you look at the injunctive relief, and I'm not going to go over it again in length, we did for Magistrate Judge Lauck, I think plaintiffs' counsel did a good job of explaining what we are accomplishing in the injunctive relief. But just take one little segment of that. And I think that Mr. Caddell did a good job in identifying JoAnn Nix, this is the objector to the (b)(3) case, because I really do believe that that is exemplary of what we were trying to accomplish, you know, of what is accomplished by this injunctive relief. That being solving the issue that was raised in the complaint, solving the issue that I think just mere compliance with the FCRA would not achieve.

The other thing I want to address real quickly is the suggestion that implementing this injunctive relief is not burdensome on my client. And I think quite to the contrary, if you looked at the Declaration, again, the only evidence in the record, from Tom Sizer, a

businessperson at LexisNexis, he estimated that the costs of implementing the injunctive relief would be approximately $6 million. And also, Your Honor, he stated the fact that it will cause some disruption to the business of LexisNexis.

Even if you are not familiar with information technology, and it is not something that you do on a day-to-day basis, I think four points make it easy to reach the same conclusion as Mr. Sizer, that this is going to be burdensome and expensive and not merely just a flipping of a switch or putting something on a website like with the PAMPERS litigation, or putting a little disclosure on a box of PAMPERS. This is something substantially more significant. In changing the solution, meaning the Accurint that existed prior to the settlement, the Accurint that's contemplated in the injunctive relief, there are billions of fields of information that are going to have to be sorted, analyzed, categorized, and then put in the right place in terms of the system configuration. Then somebody has to go through and figure out what systems can touch which elements of data. That's a fairly complex architectural, technological design. It is significant.

Likewise, frankly, Your Honor, people are resistant to change. And that holds true not just for me,

but it holds true for my client's customers as well. So there's going to be a lot of resources that my client is going to have to put at its disposal to get customers that have been used to using Accurint for ten-plus years in a certain way, with certain regulations, to accept a new paradigm. And that's what we are doing in this injunctive relief, Your Honor. We are implementing a new paradigm. And it is our hope as well as plaintiffs' hope that people recognize the value of that new paradigm.

I want to go back to the point of finality, because I think it is important, Your Honor. You know, the objectors have taken elements of the settlement agreement and they want to pull those elements out and want to attack those elements in isolation. They want to say that the class action waiver, that's improper. Or they want to say that the release of the statutory damages claim, that's improper. I think for Your Honor in looking at the JIFFY LUBE factors and looking at the fairness and reasonableness of this settlement, you have to look at it in its entirety. Because when those two competing interests in the mediation, when they converged and they fought, the consequence of that was the settlement and it was the entirety of the settlement, each and all of those elements.

And the finality, again, it is this question of

whether Accurint is a consumer report or not. So why is the class action waiver important? Why is the release of statutory damages important? And the reason being, Your Honor, is that in those cases, the issue to be litigated for willfulness, for example, in statutory damages, is whether Accurint is a consumer report or not and was our opinion objectively reasonable or not. Precisely the issue that's at the core of this case and that we want to settle. So without that element, we don't get finality, either of those two elements.

Finally, there is some discussion about whether this settlement is appropriate for (b)(2), and should the objectors or other class members be permitted to opt out. And then I think ancillary to that is the issue of notice.

I bring that up in the context of my presentation because an opt-out right would be inconsistent with this notion of finality, but more importantly, it would gut the settlement in its entirety. Why is that so? The injunctive relief that's being offered here is the complete reworking of a product. Billions of fields that are being recoded, removed, solutions that are being developed. It cannot be customized for a single consumer. So to say it plainly, Your Honor, if somebody were allowed to opt out, they would get the benefit of the injunctive relief, of the

consideration negotiated by plaintiffs' counsel, and defendant would get none of its consideration. Because by opting out, those class members could still bring the suits, still challenge whether Accurint is a consumer report or not, and yet they would still receive the benefit of the injunctive relief.

So if you look at the case law, Your Honor, in terms of why is a (b)(2) different from a (b)(3), and I think this was referenced somewhat in Mr. Caddell's presentation, it is these issues of homogeneity, of indivisibility, of whether the damages are individualized, whether the monetary claims are individualized. And what I would say to Your Honor is that the class is homogeneous. It is the individuals whose information is in the database, the Accurint database. They have the rights to request a copy of the report. If there is a report issued on them in the future, they will have those rights. In terms of the statutory damages, those are not individualized, and I think Mr. Caddell and our papers speak to that at length and do a good job of it.

But I think more importantly, Your Honor, there has to be some difference between (b)(2) and (b)(3). And I think Professor Mullenix goes at length in her Declaration as well as in her papers to make that point. And by allowing opt-out here, you have essentially

eliminated the distinction between (b)(2) and (b)(3). Your Honor, this is a settlement, and I think that is the proper focus of what you ought to look at, is what was settled, what is the consideration, what is being included in the settlement itself, as opposed to looking at the complaint. We filed a brief, there is a brief in the record, Your Honor, that talks about why you ought to focus on what's currently before the Court and not look at the complaint.

But this settlement is about injunctive relief. It is about a homogeneous class that has non-individualized statutory damages that's being released, and most importantly, Your Honor, the injunctive relief is indivisible. If you allowed people to opt out, they would get the benefit of the settlement without having to provide the finality and the consideration that defendant negotiated as part of this settlement.

Unless there's any further questions, Your Honor, thank you.

THE COURT: All right, thank you very much. All right, we are going to stop here for lunch. It is about ten minutes after one. If you could come back at 2:15, we will get started with the afternoon session.

(Luncheon recess taken from 1:10 p.m. to 2:15 p.m.)

THE COURT: All right.

MR. MOLSTER: Good afternoon. Are you ready for the Aaron objectors?

THE COURT: Absolutely.

MR. MOLSTER: I'd like to introduce Kimball Anderson, practicing at Winston & Strawn for 36 years, admitted pro hac vice by this Court on November 7th of 2013.

THE COURT: Glad to have you.

MR. ANDERSON: May it please the Court, and thank you, Judge, for the privilege of appearing here pro hac vice. I appreciate it.

As Mr. Molster mentioned, I am a partner at Winston & Strawn. I've been practicing there continuously since 1977. And I am not a remora, Your Honor. Contrary to what you may have heard or read in the parties' submissions, I am not a professional objector. Although I have appeared in dozens and dozens of class actions throughout my practice, this is the first time that I have ever stood up and objected to a class settlement. And I was persuaded to do it in this case, Your Honor, because the proposed settlement before you reflects an unprecedented and in our view unlawful use of Rule 23(b) to discharge substantial and viable damage claims belonging to parties who have not had their day in Court.

Someone had to speak up, and we chose to do so.

So what I plan to do today is address the critical, and I think dispositive, issue of whether Rule 23(b) allows for the discharge or release of money damages as the parties propose to do here.

I do not intend to dwell on the, or even respond to the ad hominem attacks that Mr. Caddell made on Mr. Schulman and Mr. Molster and I. I just hope that those kind of ad hominem attacks, the kind of self-righteous finger wagging, have no proper place in this courtroom. We went through slide after slide where Mr. Caddell labeled us inexperienced, ignorant, in one case, unethical. I'm not going to respond to that other than to say I hope we have heard the last of it and I hope it has no proper place in this Court.

What this Court should be focused on, I respectfully suggest, is the threshold issue of whether Federal Rule of Civil Procedure 23(b)(2) allows for the disposition, the discharge, the release of money damage claims without proper notice and without a right to opt out. And we respectfully suggest, and as I will explain in more detail, that the rule does not allow it and one need look no further than the WAL-MART STORES v. DUKES case, which I will get to in a moment.

Rule 23(b)(2), Your Honor, is, of course, the

proper procedural vehicle for certifying class actions where the relief sought consists solely of declaratory or injunctive relief. Rule 23(b) cannot under the post-WAL-MART jurisprudence be used to certify and dispose of class claims seeking viable money damage claims. Those claims are certifiable under Rule 23(b)(3).

Let's back up with the procedural history here. There was a complaint filed on behalf of a wide-ranging class, a class that includes my clients. My clients are over 20,000 real people throughout the United States. We have done a little bit of a count. Over 250 of them live in Virginia. They have all signed engagement letters with my firm. Each is a victim of Fair Credit Reporting Act misconduct. We served them with a questionnaire. We know they are real people with real credit problems, real grievances against the defendants, and with real damages, and my clients, over 20,000 in number, is a very, very substantial number. And despite the disparaging remarks that you heard from Mr. Caddell, I hope that you will accept that these are real people with real injuries and with real money damage claims, and their claims are being thrown under the bus here. So we have a complaint filed. The complaint seeks money damages for Fair Credit Reporting Act violations.

The complaint, the operative complaint before

Your Honor does not even seek injunctive relief. Frankly, that made sense to us, because the Fair Credit Reporting Act does not mention injunctive relief as available relief. Accordingly, most courts have said that private parties do not even have standing to seek injunctive relief under the Fair Credit Reporting Act. That issue has not, of course, been resolved definitively by the Supreme Court. But the Supreme Court has said in other statutory construction cases that the Court is not going to infer standing or a private right of action unless Congress has been pretty darn express about it. Here, Congress has not. In any event, we had a complaint on file, an operative complaint, that doesn't mention injunctive relief. It doesn't mention Rule 23(b) at all. So so far, so good.

The case proceeds on, apparently, for several years. But now we have an impending train wreck. And I don't use that term lightly. But the train wreck is that my clients under this proposed settlement receive no money damages; they are required to release their claims for statutory and punitive damages, which the courts have repeatedly recognized provide the only practical way of obtaining money damages in these kind of cases. Their right to compensatory damages has been severely crippled because the parties propose to strip from my clients the

right to assert their compensatory damage claims in a mass action or in a class action. And numerous district courts have recognized, this kind of crippling of the right to seek compensatory damages effectively deprives many, many consumers of a practical remedy, because oftentimes the amounts are de minimis and no one can afford to or will file a lawsuit for compensatory damages. Some people do. But the courts have recognized that for the vast majority, it is impractical to seek a claim for compensatory damages without the right to seek it in a mass action or in a class action.

The District Court in the District of Columbia in that L'OREAL case just came down earlier in the month of December of 2013. That Court does a very good job of reviewing the authorities and discussing why stripping consumers of their right to pursue compensatory damages, stripping them of the right to do so via a mass action or a class action, is indefensible in these kinds of cases. So in any event, now we have a complaint on file from my clients that is seeking compensatory, statutory, and punitive damages, and we have -- and it doesn't mention injunctive relief, doesn't mention Rule 23(b), but now we have a settlement that proposed to suddenly convert this into a Rule 23(b) case and to strip my clients of all effective monetary damage claims.

Analytically, I'd like to suggest to the Court a two-step approach. The first threshold issue is the one I've mentioned. Can this class in its present form even be certified under Rule 23(b)(2)? The second issue analytically is, if it can be certified under Rule 23(b)(2), is the settlement fair. You heard this morning from counsel two, maybe three hours of argument on the second issue, the fairness issue. But I'd like to respectfully suggest to the Court that you need not even get to the fairness issue if you determine as a threshold matter that this class cannot as a matter of law be certified under Rule 23(b). If this settlement, if this Rule 23(b) settlement cannot be certified, then the Court need not be concerned with whether the proposed injunction is a sea change, revolutionary, or worthless. You have considerable views that have been expressed by Mr. Schulman and by my clients that the injunctive relief is virtually worthless. But you don't need to decide that. That's a fairness issue. You don't need to decide that if you determine as a threshold matter that this settlement cannot be certified as a matter of law under Rule 23(b)(2).

Similarly, whether counsel is adequate, whether they worked really hard with the finest mediators to effect this settlement, all of that is irrelevant if the

threshold issue is not joined and met. And these counsel for parties, for the parties, in their three-hour presentation, conspicuously avoided talking about this threshold issue, and they conspicuously avoided grappling with the United States Supreme Court's decision in WAL-MART STORES v. DUKES.

So let's apply WAL-MART STORES v. DUKES to this case. To do that, we have to start with the complaint allegations, Your Honor. These parties would suggest that this Court should start with the settlement agreement. But that is a proposition that puts the cart before the horse. That is a proposition that has been rejected unanimously by the courts. The courts say that the starting point in the analysis of whether to certify a class is you look at the complaint allegations. And here, the complaint identifies three sub-classes of plaintiffs that the plaintiffs say are certifiable under Rule 23(b)(3), not (b)(2). They are here on (b)(2) now, but the complaint identifies three sub-classes. The first sub-class is a class they call impermissible use class. This is a class of persons. It is a very large class, apparently, for which the defendants allegedly sold credit reports for an impermissible purpose. And if those allegations are proven, that is a violation of the Fair Credit Reporting Act.

The second sub-class alleged in the complaint is a class of persons who apparently requested and copied their credit reports. And the third class is a class of people who apparently disputed the contents of their credit reports. I'm gathering that Ms. Nix is in the third category. In any event, it is only the second and third category of people that this proposed settlement gives any money to. But again, getting back to that complaint, no mention is made in rule -- in the complaint or Rule 23(b), in no mention of injunctive relief, and I think for good reason. Now, for the first time, we hear in open court Mr. Caddell say, "Well, gee, the focus of the case all along has been injunctive relief." I question the credibility of that. Because if injunctive relief has been the focus of this case all along, why hasn't it been in the operative pleadings since the beginning of the case? Why isn't it in the complaint? Why hasn't there been motions for preliminary injunction or even a permanent injunction?

And if injunctive relief has seriously been the focus of this case since the inception, then that seriously calls into question the adequacy of counsel who failed to plead it and failed to pursue it in any operative pleading in this Court.

I think what's going on here is rather

transparent. I think that injunctive relief did not become the focus of the plaintiffs' counsel until they figured out that it could be a hook, a procedural hook for discharging massive, viable money damage claims and for getting $9 million in legal fees. And, of course, that is the hook that we now see these plaintiffs arguing. And I'm going to address that hook in more detail in a minute. Because it has to deal with this entire notion that statutory and punitive damages are now somehow incidental to the injunctive relief that they have thrown into the case at the last minute and, therefore can be discharged without notice and without a right to opt out.

But first, a few more comments about the complaint. The operative pleading before the Court also alleges that certain plaintiffs are in a post-ADAMS sub-class and apparently a pre-ADAMS sub-class. And as you have heard today and as you know from the papers, the reference to ADAMS is, of course, a reference to the decision of the United States District Court for the District of New Jersey in the ADAMS v. LEXISNEXIS case. And the Court there entered a decision on May 12th, 2010. And in that decision, the Court held that if the plaintiffs' allegations were proven, that the defendants' reports, which are apparently much the same reports that are issued in this case, might very well be consumer

reports within the meaning of the Fair Credit Reporting Act, and the New Jersey District Court further held that plaintiff Adams had stated a viable claim for compensatory and statutory damages under the Act. Accordingly, the District Court denied the defendants' motion, 12(b)(3) motion for judgment on the pleadings.

I heard counsel before lunch break declaring that ADAMS was a big win for them. But I've reviewed the docket. They lost their motion to dismiss; they lost their motion to reconsider. If they had a slam dunk motion for summary judgment, they sure didn't bring it. And if these claims are so frivolous, and they want finality for their notion that the accused credit reports are not offensive under the Act, then why don't they just move for summary judgment? Why are they afraid of giving my clients the right to opt out and to go their own way? Why are they afraid of proper notice and due process that should be available to them under Rule 23(b)(3), but is being deprived from them because they are trying to fit this round peg into this square hole under Rule 23(b)(2)?

So now we know what the complaint says. The complaint alleges multiple sub-classes, classes with differing interests, differing rights. I'll add one other thing: Their allegations are that different products were sold to different people. So our analysis starts with the

complaint, because it is ultimately the complaint that drives the issue or determines the issue of whether a class is certifiable under either Rule 23(b)(2) or (b)(3). Again, it is not the settlement agreement. If it were the settlement agreement, Your Honor, then counsel, experienced counsel, clever counsel, mischievous counsel, could draft a settlement agreement that would avoid the protections of Rule 23(b)(2). Clever drafting. We say, "Oh, we just want an injunction and those damages we asked for the last four years, the millions of dollars in damages, the statutory, the punitive, the compensatory, pay no mind, you are either being stripped of those, the right to pursue those at all, or we will give you compensatory damages, but you can only file those one at a time, no class actions, no mass actions."

Well, I'm not going to cite a lot of authorities, but the authorities for the proposition that the complaint allegations drive the class certification decision are set forth in our response, our brief. It is docket Number 110 at Pages 3 through 5. Anyway.

So now we know what's been pled, what's been alleged, what's been sought on behalf of my clients. Now let's look at WAL-MART v. DUKES to see whether or not my clients' rights to money damages can be eviscerated under Rule 23(b)(2). And the good news, Judge, is that I don't

have 120 slides today, I don't have 80 slides. I don't even have eight. I have one. And I'd like to now put my one slide up on the screen. This is a quote from the majority portion of the WAL-MART v. DUKES decision, 11 Supreme Court at page 2559. In this decision, the Supreme Court concludes, unequivocally, that Rule 23(b) is a vehicle for certifying classes in complaints that seek injunctive or declaratory relief. Rule 23(b)(3) is a procedural device for certifying money damage claims. And, of course, Rule 23(b), because you are affecting citizens' right to a jury trial, a right to due process, Rule 23(b)(3) has a right to opt out. It has a right to notice. And so the Supreme Court says unmistakably in WAL-MART v. DUKES that you cannot discharge money damage claims in a Rule 23(b)(2) certification.

And here, it is the quote that goes to the heart of what the parties here are trying to do. I'm just going to read into the record the quote, although the Judge, Your Honor, you can obviously read it yourself. But the Court said that "The mere predominance of a proper injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superority of class adjudications over individual adjudication nor cures the notice and opt-out problems. We fail to see why the rule should be read to

nullify those protections whenever a plaintiff class, at its option, combines its monetary claims with a request-even a predominating request-for an injunction." End quote.

That ruling drives a stake in the heart of this proposed settlement, because this proposed settlement at bottom is seeking to nullify the procedural protections that the rules and the Due Process Clause of the United States Supreme Court afford absent class members who have viable damage claims. And the Court is saying here and throughout the decision that you cannot, I don't say you, I say the parties, no parties can nullify those protections just by combining monetary claims with a request for injunction, even a predominating request for an injunction.

I'm not going to give you even that there is a predominating request for injunction in this case, because the complaint didn't ask for an injunction, and the vast majority of courts have said that injunctive relief is not even available under the Fair Credit Reporting Act. But assuming for purposes of argument that an injunctive relief claim could be made, even one that is predominating, it cannot vitiate Rule 23(b)(3)'s protections over my clients, my absent clients' right to money damages.

And here, I address why injunctive relief came up so late in this case. I think it is pretty transparent. I think the parties, these counsel, they knew they could not vitiate money damage claims under Rule 23(b)(2) without notice and a right to opt out unless they attempted to attach it to an injunction, and then say that those damages are incidental to the injunction. What's the law on that? I hope that Your Honor is already familiar with WAL-MART v. DUKES, and I'm not going to belabor it. But WAL-MART v. DUKES does not decide but casts grave doubt on the proposition that any kind of damages, even incidental damages, can be discharged in a Rule 23(b)(2) settlement or class certification. Grave doubt on that subject. And since then, many of the lower courts have recognized that grave doubt and refused to go there.

But let's just assume for purposes of argument today that the door has been left open a crack for discharging what the courts have called incidental damages. Under no possible stretch of the imagination, Your Honor, are my clients' damages incidental. First of all, they have to be incidental to something. They have to be incidental to a viable claim for injunctive or declaratory relief. There isn't a viable claim for injunctive or declaratory relief even available under the

Act. But even if there were, incidental damages are those damages that require no individualized determination and can be calculated with a computer. Those are not my words, those are Judge Posner's words in, I think, the JOHNSON decision.

In other words, it is automatic. Now let's look analytically and candidly about whether my clients' damages are individualized or automatic. What does the statute say? The statute says that if we prove willfulness or deliberate indifference by the defendants to the laws, to the statutory requirements, that we are entitled to statutory damages. The statutory damage, Your Honor, is individualized. It can range from $100 in the case of a minor violation to $1,000. And each of those ranges, from $100 to $1,000, Your Honor, applies for every violation. So what are the individualized determinations? You don't have to look any further than the complaint to see what they are. There is a class alleged in the complaint of pre-ADAMS consumers. They are going to have, presumably, at least if you believe the complaint, a more difficult time proving knowledge.

There is a sub-class of post-ADAMS consumers. They've got a better case for showing knowledge because at least at the point of the ADAMS decision, you've got a United States District Court decision saying that these

defendants' reports, as alleged, could very well be consumer reports, and they might very well be entitled to statutory damages. So you've got a knowledge issue that's going to have to be litigated on an individual basis. You don't have to look any further than the complaint, also, to see that there are many different kinds of offending products sold by the defendants. Maybe some are clearer cases of violations of the Act. Maybe there are others which are not.

And then you look at the magnitude of the money at issue here. You know, I don't know whether it is a million or a billion, but I know that the amounts that are being discharged under this proposed settlement are hardly incidental. They are hardly immaterial. It is a lot of money under any definition. And under no definition can the money damage claims at issue here be declared incidental with a wave of the hand and with no authority whatsoever. And we review the cases in our briefs. And I have studied them carefully myself. No court has ever held that statutory and punitive damage claims under the Fair Credit Reporting Act are incidental. No court. So if you were to do that, you would be in uncharted waters.

It is simply not a formulaic, computer-driven decision. There is a good example, I think it is the JOHNSON case out of the Seventh Circuit, where the Court

in dicta talks about what might be an incidental claim. The incidental claim in that case involved a pension plan where the parties were seeking declaratory relief to construe the meaning of the pension plan. Once the meaning of the pension plan was construed, then there was a formula in the pension plan. You just pushed the computer and the computer spit out a three percent annual cost of living raise or a four percent annual cost of living raise. It was formulaic. It was computer-driven. That might be an example of incidental damages where there's no individual determinations. But here, get going into the face of the complaint, the operative pleading, everything about these claims screams individual determinations: What product did you buy? When did you buy it? How many times was your report abused? How many impermissible uses were there?

And similarly, damages: Everybody's compensatory damages are going to be variable. The parties would say, "Well, Judge, we are not making them waive their compensatory damages." That is technically true. But they are crippling it, crippling it by stripping a right to pursue compensatory damages, stripping from that right to pursue compensatory damages, stripping from a Seventh Amendment right to a jury trial on compensatory damages, stripping it by taking away the

right to pursue those damages via a mass action or a class action. And that is an abomination, Your Honor.

Now, to be sure, there are cases that have upheld class waivers. But not in this context. The cases that have upheld class waivers are those where the parties have freely and voluntarily entered into a contract, a contract that is not unconscionable, a contract that does not have oppressive terms, a contract where each side has been represented, they are not widows and orphans, and they have a fair opportunity to bargain their Rule 23 rights away. But that's not the case here. This isn't a case of some consumer contract or commercial contract where the parties have entered into a contract that waives a class action right. This is a case where the parties are trying to cram that down the throats of my clients, who are not a party to any such contract, who don't agree to it, haven't consented to it. And I'm not aware of any court that has allowed that kind of cram-down in the context of Rule 23(b)(2).

My clients have damage claims that are the quintessential types of damage claims that can be certified, if at all, under Rule 23(b) 23(b)(3). And of course, (b)(3) allows for notice and a right to opt out. And as the DUKES case says, the Supreme Court said in WAL-MART v. DUKES, "Plaintiffs who have individual

monetary claims must have, quote, the right to decide for themselves whether to tie their fates to the class representatives or go it alone. A choice Rule 23(b) does not ensure that they have, end quote." And that quote can be found at Page 2559 of the Supreme Court Reporter, 131 Supreme Court. But here, the proposed settlement does exactly that. It strips my clients of their right to go it alone. They get no money. Apparently the few class members that requested and disputed the reports are going to get a few hundred dollars each.

And that raises a very interesting issue: Those plaintiffs like Ms. Nix, who apparently complained about their report, she is going to get some money, I think, but anyway, that's the class, the people who requested and disputed reports, they are going to get some money apparently under (b)(3), but that class of Fair Credit Reporting Act claims, Your Honor, their claims are no better or no worse than my clients', who may not have disputed their report. The talisman of a Fair Credit Reporting Act violation is not disputing your report. Your entitlement to damages has nothing to do with whether you dispute the report. Your entitlement to damages, both compensatory and statutory and punitive, under the statute turns on whether the operative document is in fact a consumer report and whether it was used for an

impermissible purpose. Those are my clients, 20,000, that are the victims of the impermissible use of consumer reports, where the defendants created, allegedly created consumer reports and sold them for improper purposes under the Act.

My clients have exactly the same viable claims, if there are Fair Credit Act claims that are viable at all here. The viability of my clients are just as good as the class of people who are going to get some money under this (b)(3) settlement, and they get it because apparently they disputed their report or they requested a copy of it. But that, if you look at the Act, that doesn't make their claims worth more. And then you look at the Act and then you have to ask why do my clients, who have equally viable claims as those who have requested and disputed the reports, get no money for their Federal Credit Reporting Act claims? Why do the plaintiffs' lawyers get up to $9 million when my clients get no money? Why are my clients stripped not only of the right to statutory damages, but their right apparently to also challenge the future conduct of the defendants, no matter how egregious? And why are my clients, whose claims are just as good as the people who are getting money, stripped of their right to pursue class relief for compensatory damages?

There are no good answers to these questions.

You can read the parties' briefs until the cows come home and you will not see a good answer to these questions. And that, frankly, is why for the first time in 36 years of practice I'm standing up here and objecting, because this proposed settlement should not and cannot survive judicial scrutiny under DUKES and its progeny.

Mr. Caddell said, "Well, these lawyers over here, they are just inexperienced. They don't know anything about the Fair Credit Reporting Act." I'm not going to dive in the gutter with him. But I will point out that I was involved in the TRANSUNION case that Mr. Caddell mentioned. And what Mr. Caddell forgot to mention is that the District Court and ultimately the Seventh Circuit flatly and unequivocally rejected Mr. Caddell's efforts to throw a large portion of that class in that case under the bus. And at the end of the day, the District Court and the Seventh Circuit sustained everything that I was trying to do on behalf of my clients, which is preserve their right to pursue individual actions against the defendant, TRANSUNION in that case. Mr. Caddell forgot to mention that. And I wouldn't have brought it up except that he did.

With your permission, I'd like to spend a moment on another important topic, which is whether the settlement can be saved. And I have a suggestion. But

first of all, let me say that the settlement is not saved by any of the machinations that have been attempted here, carving out releases for compensatory damages, but preventing them from being asserted by class action. As I said, the L'OREAL case nixes that idea, as have other courts.

But I think the settlement could be saved, Your Honor, simply by including an opt-out right in the Rule 23(b) settlement. Rule 23(b)(2), of course, does not require notice or the right to opt out. And here the parties want to deny that. But the Court can condition approval of the (b)(2) settlement on proper notice and the right to opt out. There is certainly substantial judicial precedent for doing so. Two cases that have approved providing a notice and right to opt out in a (b)(2) settlement are the JEFFERSON v. INGERSOLL INTERNATIONAL case, Seventh Circuit decision, 195 F.3d 894. There is another decision out of the Seventh Circuit called WILLIAMS v. BURLINGTON NORTHERN, 832 F.2d 100. Those decisions review the jurisprudence in this area and find that courts can save these kinds of settlements by allowing a right of opt-out for a proposed (b)(2) settlement. You basically convert it to a (b)(3) settlement that affords the important procedural and due process rights that have been sustained unequivocally by

the United States Supreme Court in the WAL-MART v. DUKES case.

So I think the Court has discretion to do that. And you would be on solid ground. I respectfully suggest, however, that the Court has no discretion whatsoever to certify a Rule 23(b)(2) class as presented. And again, this is not me speaking. There are many cases, but a good example is the BOLIN v. SEARS ROEBUCK decision out of the Fifth Circuit, 231 F.3d 970. There, the Court said that the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion.

Here, I think we have discussed ad nauseam that injunctive relief isn't available. It wasn't even pled. We have seen yet another interesting procedural maneuver this morning at about 2:30 a.m. Mr. Caddell and his cohorts filed an amended complaint. And the amended complaint now for the first time seeks to add a claim for injunctive relief. And I haven't frankly had much time to study it because I was not up at 2:30 a.m. when it apparently came in on the electronic file. But I did try to look at it briefly before we came to Court. And they say that they are filing it as an exercise of caution. But it seems to me to be more an act of desperation. They are not asking for injunctive relief based on anything in

the Fair Credit Reporting Act. Instead, they appear to be relying on some inherent judicial equitable powers, which seems to me to be a huge stretch. But it raises this last-minute amendment which, by the way, we object to.

It raises, just opens a Pandora's Box of other problems. Because now they want to file, apparently with the consent of the defendants, an amended complaint. Their amended complaint now seeks injunctive relief for the first time. It changes completely the definition of the classes that were pled in the original complaint. And it continues to seek money damages, which are being, for my clients, are being thrown completely under the bus.

But here is the host of other problems that this creates. Notice has already gone out to the class. No members of the class have received notice of a settlement of the terms of the amended complaint. They met with the amended classes, the amended claims for relief, the rejiggering of the whole operative pleadings to try to fit this round peg or square peg into a round hole after notice has gone out, after the defendants' and the plaintiffs' counsel have joined hands and are singing Kumbaya. I have never heard or never seen amending a complaint after notice has gone out to the class. The class would have no idea that there is a whole new operative pleading upon which their rights are being

vitiated.

It is just unimaginable and it raises a whole host of new notice problems. And it just seems to me to be what I said earlier, a transparent attempt to fit this round peg into a square hole. They are just transparently trying to erect some kind of injunctive relief claim so that they can argue, incorrectly, that the millions, the tens of millions of dollars of damages that they are wiping out, you know, without notice, without a right to opt out, without a Seventh Amendment, they are going to wipe it out under the argument that now they are suddenly incidental to this last-minute claim for injunctive relief, that no class member has ever seen in any operative complaint. It just has a smell to it, Your Honor. And I hope that the Court will see it for what it is.

So I think you can save this by providing for a right to opt out. And I would ask this question, particularly to the defendants, whose counsel stood up here and said, "Oh, our claim, you know, that there has been no violation of the Fair Credit Reporting Act is rock solid." It is summary judgment stuff. "Boy, and if we hadn't settled this case after four years we were going to file a motion for summary judgment. If we had not lost our motion on the pleadings in the ADAMS case, and if we

had not lost our motion for reconsideration, we would have been right there with a slam dunk summary judgment motion." Well, I say have at it. If their claims are so conclusive, file a Rule 56 motion. But do not come into Court and file one, or ask that one be granted effectively against my clients without my clients' opportunity to even brief the issue, to brief whether there are contested issues of fact as to whether there are violations of the Act here. Do not come in here and ask for judgment as a matter of law without affording my clients their Seventh Amendment right to a jury trial. If you've got a summary judgment claim, bring it on. And if it is ironclad as you say, why are we releasing it? Why are you demanding a release? Why are you so afraid of the procedural protections of Rule 23(b)(3)? If these claims are frivolous, why be afraid? Why try a cram-down that eviscerates my clients' rights.

Sure they want finality, but the way you get finality is that you go to trial, you get a judgment, you file Rule 56 motion for summary judgment, or you properly follow Rule 23. And there, you can get finality if you give people the right to opt out. And I suspect if they give people the right to opt out, they are going to get massive finality. There's going to be some who are going to opt out to go their own way, as the Supreme Court said.

But many will not. And they are going to get some finality that way. But you don't get finality by running roughshod over the procedural protections in Rule 23(b)(3). You don't get finality by trying to jam a release of tens of millions if not hundreds of millions of dollars of statutory and monetary damage claims into a Rule 23(b)(2) certification. That's not how you get finality. That's how you get reversible error.

I think I've said enough at this point, Your Honor. And perhaps I'll just leave you with perhaps a bad analogy to Star Trek, that famous saying about "Going where no man has gone before." These parties are attempting to lead this Court to a place where no Court has gone before, at least post-DUKES and WAL-MART. But this should not be an uncharted space exploration. The chart here has been drawn quite clearly by the United States Supreme Court, and so I'm going to end with where I started, with this quote from WAL-MART v. DUKES. The Court said: "We fail to see why the protections of the rule should be read to nullify those protections whenever a plaintiff class, at its option, combines its monetary claims with a request-even a predominating request-for an injunction." End quote. That is exactly what these plaintiffs have done. They have combined their monetary claim with a last-minute request for an injunction, and

then they have thrown the monetary claim under the bus. And that is illegal under Rule 23(b), Your Honor. Thank you for your attention.

THE COURT: All right. Thank you.

MR. SCHULMAN: Good afternoon, Your Honor. Adam Schulman on behalf of myself. Preliminarily, I wanted to seek the Court's forgiveness for the fact that my supplemental fee objection was docketed one day after the November 26th deadline set by the Scheduling Order. The plaintiffs' papers were filed late on the evening of the 22nd, then I spent the following Saturday and Sunday digesting the filings and writing my response. But as a non-ECF filer, I had to have the objection mailed via FedEx overnight to the Court on the 25th, which I did, intending for it to be received and docketed on the 26th.

MR. BENNETT: We do not object, Your Honor.

MR. SCHULMAN: Okay.

THE COURT: All right.

MR. SCHULMAN: Well, with that, that's dispensed of. But as a member of the proposed (b)(2) class, I have objected to the certification of the class, to the terms of the settlement itself, to the class notice, to the request for attorneys' fees, and to some of the expert testimony submitted by the plaintiffs. To these I would like to now add objection to the filing of the amended

complaint late last night for many of the reasons stated by Mr. Anderson, most notably the lack of notice to class members, any notice whatsoever, let alone reasonable notice required by Rule 23(e). And as well, an objection to the Declarations filed in support of the fee motion late last night and the reply in support of the fee motion as violations of Rule 23(h), which also requires notice to the class of all the motion papers. And I would request that the Court strike or at the very least disregard all those papers.

Substantively, if the Court has any pressing areas it would like me to address, I would be glad to begin there. If not, what I would like to do is address both the plaintiffs' and defendants' responses to my objections. And please feel welcome to divert me at any time to any issues or questions the Court may have.

Starting with the certification issue, the settlement class as proposed violates both 23(a)(4) and 23(b)(2). As could be expected, the plaintiffs maintain that a (b)(2) certification is proper because of what the settlement obtains, that is, unitary injunctive relief. They attempt to reframe the WAL-MART v. DUKES decision as being concerned with obtaining indivisible relief. That was one concern of WAL-MART v. DUKES, but it was not the only concern. In reality, while it is certainly one

necessary pre-condition of a (b)(2) settlement, certification, it is far from the only pre-condition. WAL-MART indicated dismay that, quote, about half the members of the class approved by the Ninth Circuit had no claim for injunctive or declaratory relief at all. That's 131 Supreme Court at 2560. Here, of course, because of the FCRA and its terms, no class members have claims for final injunctive relief, much less half the class that was reversed in WAL-MART. WAL-MART also clearly expressed concerns about preclusion of absent class members' damage claims, quote, by litigation that they had no power to hold themselves apart from, end quote. And that's 131 Supreme Court at 2559.

What is more, the plaintiffs -- if the plaintiffs are correct that all that is necessary is obtaining injunctive relief, then the Second Circuit was wrong in HECHT, the Seventh Circuit was wrong in CRAWFORD, the Sixth Circuit was wrong in TELECTRONICS PACING SYSTEM, and the Fifth Circuit was wrong in BOLIN. But each of those decisions was exactly correct. (b)(2) certification requires more than just obtaining injunctive relief. It requires a cause of action that allows injunctive relief, a complaint that seeks injunctive relief, and most importantly, a waiver that only releases claims for injunctive relief.

Most recently, the District of D.C. in a thoughtful opinion rejected a (b)(2) certification in the RICHARDSON v. L'OREAL settlement last month. RICHARDSON involved allegations that L'OREAL's labeling on hair products deceived consumers by asserting that the products were sold exclusively in salons, while they were in fact also sold in retail mass market stores. The parties attempted to settle the case for the defendants' agreement to remove the offending representations, prototypical prospective injunctive relief, and might I add, relief that satisfied the totality of what the complaint was asking for. In fact, full relief is what they were claiming in that case.

Judge Bates refused to certify the class under (b)(2) for two reasons, each equally applicable here. First, Judge Bates found that the settlement's release, which released no more than absent class members' right to bring class actions for damages, was inconsistent with (b)(2) and Supreme Court jurisprudence. Here, of course, the release is even broader than that. It releases not only the right to bring class actions for damages, but also, the right to bring willful non-compliance claims in an individual capacity.

Second: Judge Bates rejected the (b)(2) certification because there was an intra-class conflict

between those who purchased the L'Oreal products in salons and those who purchased the products in big box retail stores. This mirrors the division within the (b)(2) class in this settlement. Those members of the (b)(2) class who constituted the initial impermissible use class have much stronger claims than those whose information is possessed by LexisNexis but about whom no consumer report has ever been issued. The case law is pretty clear on that.

As the RICHARDSON Court found, where class members possess claims of divergent strength, just as the class members in this settlement do, that eliminates the necessary cohesiveness of a (b)(2) class. And further, for the reasons given in my objection, it also eliminates the adequacy of representation required by Rule 23(a)(4).

Mr. Caddell now says there is no intra-class conflict because the FCRA allows some rights to all class members. But the intra-class conflict is found not in the fact that the FCRA doesn't allow any rights to all class members, but rather, in the fact that to bring certain claims for damages under the FCRA, a report has to have been issued.

And yet, there are more reasons than just the two in L'OREAL to reject the (b)(2) settlement here.

THE COURT: Could you slow down a little? You are going to kill my court reporter. Slow it down a

little bit for me.

MR. SCHULMAN: There are more reasons than just the two in L'OREAL to reject the (b)(2) settlement here. Claims under the FCRA do not permit injunctive relief. That is enough to demonstrate the certification is improper, as Mr. Anderson referred to. The BOLIN case out the Fifth Circuit says specifically, stands specifically for that proposition; that if relief is not available under statute, it cannot be -- if injunctive relief is not available under statute the class cannot be certified as (b)(2). That was also a settled, Your Honor, not a litigated class. That was an attempted settlement class certification.

But the plaintiffs say that doesn't matter, because they are permitted to settle for relief outside that available under the FCRA. Under the CLEVELAND FIREFIGHTERS case, it is true as a general matter that the parties may obtain relief outside that available under statute. But that case has no bearing on whether (b)(2) certification is appropriate. Rather, the case law firmly holds that FCRA cases may not be certified under (b)(2), and this is not altered in the context of a settlement, where the requirements of certification demand undiluted, even heightened attention. That's from the Supreme Court's opinion in AMCHEM.

The plaintiffs seek to have this Court reimpose exactly what WAL-MART repudiated. Namely, the subjective standard on whether the named plaintiffs and class counsel think that injunctive relief is important. That is not the law any longer. If WAL-MART did one thing, it was to reject that very standard for (b)(2) certification.

I think I should mention, I wasn't planning to, but since it came up, I would like to mention why Professor Mullenix in her Declaration is incorrect, even though I do think that that testimony is impermissible as opining on a legal issue. I would like to address it on its merits. When she says that this case cannot be a (b)(2) sell-out because there is a (b)(3) settlement on the side, the fact that she is overlooking is that the (b)(3) settlement class is only 31,000 class members, whereas the (b)(2) class is 200 million class members. Or 100 million. There has been a bit of wishy-washy in the papers about it, but I think 200 million may be the right figure, but at least 100 million. So it is very little solace for the 99 million plus that get no money damages and it is difficult to see how it can't be a sell-out just because there is a small segment of (b)(3) class on the side that's actually getting money, valuable money damages.

But I would say that I think that the proposed

(b)(2) settlement appears to be an attempt, a legally futile one at that, to avoid the individual notice requirements to class members guaranteed by the Constitution's Due Process Clause. Despite the plaintiffs' contentions, however, the standard for notice of a class action settlement is not that anything more than a mere gesture suffices. Instead, the seminal MULLANE Supreme Court decision sets the standard, and specifically states that where the names and Post Office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. That was before (b)(3) came into existence. It was before 1966 in the modern class action era. But this is the standard for settlement notice, Your Honor. And it applies in this case. The Constitution didn't change when (b)(3) and (b)(2) were enacted in 1966. It applies to (b)(2) and (b)(3) suits alike.

There is no dispute -- and it is sort of ironic that Mr. Caddell just stood up and argued that the notice is the most important right under the FCRA, given that they managed to deprive millions upon millions of class members of due notice in this settlement. There is no dispute that the defendant possesses class members' contact information. After all, alleged misuse of that

information is what this very case is about. Approving any settlement without direct notice in this case would violate the Constitution.

Now I'd like to discuss the fairness of the settlement terms for a moment. There are two over-arching components of the (b)(2) settlement. There is a cash component of just over $5.5 million. As we know from the DRY MAX PAMPERS decision and other cases cited in my objection, this is a real component of the settlement, even though it was normally segregated from class relief, even though it was negotiated after class relief. Because the class settlement had not been approved at the time. A hundred percent of this cash component is going to class counsel and the named representatives. Then there is the injunctive component. Lexis will agree that certain programs are covered by the FCRA and the class will agree that other practices and products are exempt from FCRA liability for seven years. Plaintiffs submitted the Declarations of Professor Richards where he candidly acknowledges that one cannot precisely value the relief, but still maintains that the relief is worth at least 160 million, and likely upwards of billions of dollars if measured by the amount of statutory damages saved.

In their response papers, plaintiffs suggest a more modest value of $23 million if just two percent of a

hundred-million-person class requests the free report. Given that claims rates around the country in class settlements generally don't exceed even half of one percent, the two percent suggested rate is very, very generous, especially in light of the fact that everyone knows they can get annual free credit reports from other credit rating agencies.

A 2 million person claimed estimate also flies in the face of the fact that there have been less than 200,000 visits to the (b)(2) settlement website according to the Settlement Administrator's Declaration. Moreover, valuing the free report at a hypothetical $23 million, or even worse, at $160 million, would violate the Class Action Fairness Act, codified at 28 U.S.C. Section 1712. Section 1712 forbids courts from valuing coupons at any amount hypothetically estimated. Instead, it requires courts to value the relief based on the value actually obtained by class members. The legislative history of 1712 and case law demonstrate how that statute applies equally to coupons for a free product like a free credit report as well as coupons that only provide for a discount. So I would now like to register my objection to the parties' invitation to violate the Class Action Fairness Act.

More importantly, though, all these numbers that

the plaintiffs and their experts throw out for the supposed value of the injunctive relief, whether it is 23 million, 160 million, 2.2 billion, they all only consider half of the equation. They ignore entirely the future concessions that the settlement makes on behalf of non-consenting absent class members. The settlement waives class members' rights to assert FCRA liability for both Collect Once, Use Twice data practices, and other post-settlement products for all claims accruing before 2020. The settlement effectuates an agreement that Contact & Locate products, which haven't been developed yet, are not consumer reports under the FCRA. Whatever benefit exists on the plus side of the equation is offset by these concessions that the class is giving up, which the parties seek to have the Court memorialize through the injunctive relief order and the methodology asserted by all the experts and the plaintiffs in their evaluations, for them not to even consider that half of the equation makes that methodology facially unreliable.

At base and for good reason, the law doesn't authorize class action attorneys to impose these future costs on absent class members, especially on class members who are not even permitted to opt out of the agreement. The law doesn't allow parties to prospectively overwrite the statutory text of the FCRA and bind absent class

members to the parties' conception of what the legislative scheme should look like. But it is even worse to pretend that when valuing the settlement, that these costs and concessions are not part of the arrangement when they clearly are. That, Your Honor, is why you see two attorneys up here for LexisNexis arguing strenuously in favor of the settlement, because on average, in fact, it is possible that it could be a negative value settlement for class members and a positive value settlement for the defendants.

We can't know how great these costs will be, the ones imposed on class members. Because no one knows what products will be rolled out by Lexis in five years, and whether they will be compliant with the FCRA or not. If Lexis is released from large-scale liability based on future conduct, it is entirely possible that this is a negative value settlement for the (b)(2) class members. Such settlements are also prohibited by the Class Action Fairness Act, this time by Section 1713.

Another fundamental problem with attributing this vast value to the settlement agreement is that fundamentally, LexisNexis is in the driver's seat. Because of the nature of private enterprise, Lexis dictates its future course of conduct. There is nothing unreasonable about that. But because of that, prospective

agreements like this are tantamount to a game of chess, where the defendant is always playing as white. A class member who believes Lexis is failing to satisfy its obligations cannot go straight to Court but is subject to the limited remedial mechanisms allowed by the settlement agreement. A fine-toothed reading of the settlement agreement reveals loopholes that may allow Lexis to escape having to provide any benefit to absent class members. As just one example here, Settlement Section 4.34 allows Lexis to walk away from its injunctive obligation under a number of conditions, including quote/unquote inconsistent judicial ruling. Does that mean that if a court later deems a program akin to the collections decisioning program, to fall outside of the FCRA coverage, then Lexis can walk away from the agreement entirely? It is not clear. But what is clear is that the class isn't allowed to reciprocally walk away under such circumstances. What's clear is that Lexis is in the driver's seat.

To put this another way, the terms of the prospective agreement are way overreaching by releasing future conduct class members' claims that the parties have no right to release, and yet, at the same time, the agreement is not detailed enough by permitting wiggle room that could prevent the class from attaining the benefit of the bargain. I don't say this to impugn the competence of

the attorneys for the settling parties in ironing out the particular terms. Rather, I mean to say that the error was even in trying to come to this type of future-looking agreement in the first place. This is not the type of agreement fit for settlement of a class action lawsuit pending before an Article III tribunal. It is more like a consent decree that the FCC or FTC might reach in an enforcement action.

One case I didn't cite on this point in my papers, but that I encourage the Court to look at, is Judge Chin's decision in AUTHORS' GUILD v. GOOGLE, INC., where he rejected a similar settlement with respect to the Google Books copyright lawsuit up in New York. That 2011 decision is reported at 770 F.Supp.2d 666.

Fundamentally, there is a misconception about the role of class counsel that is present here. Class counsel are fiduciaries and trustees for absent class members. Class counsel are not mediators of a prospective business agreement between absent class members and the defendant, nor are they, to use the terms of Mr. Raether, authorized to establish a new paradigm for which they entitle themselves to a $5.5 million brokerage fee. In a class settlement, parties often stress the importance of compromise, and there is definitely something to that notion. But a valid compromise is arriving at some

settlement between the amount sought in the complaint, here, tens or hundreds of billions of dollars in damages, and the amount that would be received if the case was wholly unsuccessful, zero dollars. Never, never, ever should the class be put at risk of being worse off than they would be if the suit was never filed.

Yet the concessions in the settlement agreement, most namely the waiver of future accruing claims, risks just this, and the law must not permit it.

And I would like to address -- Mr. Caddell asked what I would say to Ms. Nix, somebody who wanted injunctive relief as the remedy. Here is what I would tell her. I would say that under the statute, the proper remedy is monetary relief. And if the claims are viable and can be pursued successfully, then the defendants will change their practices of their own volition to avoid having to pay future damages in the future. That's how the Article III process should work.

Thank you, unless you have further questions.

THE COURT: Thank you.

MR. CADDELL: May we have a brief rebuttal?

THE COURT: I'm just making sure everybody over here is satisfied. You have said as much as you want to say? Okay.

MR. CADDELL: Mr. Bennett had a couple comments

and then I'll have a couple.

THE COURT: Sure.

MR. BENNETT: Good afternoon, Your Honor. We do have some bit to say as to our own WAL-MART v. DUKES text and the arguments regarding the use of Rule 23(b)(2). But I'm standing in place of my more senior co-counsel to respond more specifically to the implication, because there wasn't any evidence, it is just simply implication or insinuation, I think that counsel's words were that he questions the credibility of our claim that this case was about injunctive relief all along.

Now, we are in the Eastern District of Virginia, where I for 19 years have litigated. And I'm respectful in all courts, but in this one more particularly as to the courtesy as to opponents that are opposite one another. But this Court has had me practice, has seen me practice. And the suggestion that this group of attorneys, Mr. Anthony, who is my most common adversary, and the all-star cast of Fair Credit Reporting Act from our perspective, may be villains, but defense opponents, that we would have represented on our law license, made statements to the Court as to the concocting the idea that injunctive relief was an afterthought, I think, is itself what defies credibility.

We presented both in briefing and in the slides

a discussion at a high level as to we were discussing injunctive relief. Professor Miller examined the time, the time records, the pleadings, the work. You have evidence that is already there and you have no evidence to the contrary. But let me tell you, if the Court please, may I respectfully explain what it meant to focus on injunctive relief. The first meeting was in my office in 2009. Ms. Nash, who is an in-house litigation attorney for LexisNexis, and then the General Counsel, flew to our princely offices in little Newport News, Virginia, where we had a PowerPoint presentation, and in my office, while I was similarly technologically inept, we looked at a laptop. That was almost entirely on practice changes.

The next meeting in person was in Philadelphia, Mr. Francis's office. Mr. McCabe came in. We wore bluejeans and we had danishes and the like. That was entirely on practice changes. We then followed up --

MR. ANDERSON: I apologize for interrupting. None of this is of record and Mr. Bennett is making himself a fact witness in this case and I have to object. It is with respect. But none of this is in the record.

THE COURT: The objection is overruled. You know, you attacked the credibility of somebody. They get an opportunity to respond. That's all this is. I didn't give it much weight to begin with, Mr. Bennett, if you

want to save your breath. But if somebody says something that personal in nature about another lawyer, he doubted his credibility when he told me and they told me they were discussing it, you can make that point without that kind of attack. Your point is a strong one. I'm not saying anything about the point that you made. But the fact that they say this was a discussion that was predominant, I have no reason to doubt that. It is not going to move the case one way or another. So your objection is overruled.

MR. ANDERSON: My point is, it isn't in the pleadings.

THE COURT: I understand your point. I heard you.

MR. ANDERSON: Okay.

THE COURT: Just have a seat.

MR. BENNETT: Judge, now, the second and only other issue is in the assessment, the continued discussion, we challenged the defendant. It wasn't pleasant to hear other lawyers say to lawyers across the courtroom, "You don't know anything about the Fair Credit Reporting Act. You have not litigated, you have not filed, you have not tried these," and I expect that everyone in a context like this would challenge one another. But that is an unrebutted truth. And you know it, because you aren't considering a competing class

action, like they often exist. Objectors, it is unusual in my case, as the Court is aware, but you are not considering the argument that we are going to collapse or release the claims of all these individuals on whose behalf Watts Guerra, respectfully, Judge, who isn't even here, or its hired counsel, have filed. And you know that the strategy is not to litigate or prosecute them, because you hear at the end of the argument what you would have always heard from professional objectors. They don't want to litigate separate cases. They want to keep the case that we, that others, that I have been working on, and find a way to profit from it. And that's okay. That's the system, that's the rules.

But the suggestion that we have an opportunity for you, Judge, could be translated as, "Your Honor, here is a solution. Why don't you put this on hold and force the parties to come speak with us to negotiate a back deal." And we have not done that.

Judge, we have been litigating this, the Court is aware we have been litigating it. The credibility, I appreciate, is I think apparent from the papers, from the record evidence. And Mr. Caddell will answer questions regarding the WAL-MART and the incidental nature of the relief.

THE COURT: Thank you.

MR. CADDELL: My co-counsel have passed me, I can promise you, more notes than I intend to address. I'll be brief.

First, I was struck by Mr. Anderson's claim that, quote, we conspicuously avoided talking about WAL-MART STORES. In fact, if the Court recalls, and you can look at slide, I think it is Slide 61 in our presentation, we actually quote and reference specifically WAL-MART STORES and that case, because in fact the Supreme Court expressly said that they were not deciding that a (b)(2) class, which released incidental damages, was inappropriate. And I specifically pointed to the L'OREAL Court, and we had a slide where the L'OREAL Court analyzed Wal-Mart and said, "I'm not saying that you can't do this, but they need to be incidental." And then of course we showed the slide where the L'OREAL Court said, "Incidental damages are those that accrue to the class as a whole, that can be --" and that WAL-MART quote is, in WAL-MART, they said it could be done by a computer program, something of that nature. That's precisely the kind of damages that Mr. Anderson was referring to or describing when he talks about his clients' claims.

That was another interesting thing he said. He said, "We have real damages against the defendant, real money damage claims." What are they? He never told you.

Ms. Nix has real damage claims. Ms. Nix was harassed sixteen times by debt collectors over five years for debts belonging to another person, and she had no recourse. Those are real money damages. That's something that could be pursued. And that's not a statutory damages claim limited to $100, to a thousand dollars, or something of that nature.

The claims that Mr. Anderson is talking about all depend on the issue of willfulness. I've sat here for an hour and twenty minutes, and both Mr. Anderson and Mr. Schulman, and I listened very carefully, and I never once heard either one of them tell you how they would overcome a willfulness defense. They didn't. They ignore it. They blow past it. They dismiss it. But the reality is, the Supreme Court in the SAFECO case made it very clear, that is a formidable defense. And as Mr. McCabe pointed out, these circumstances make it a very formidable defense.

Then I think the last point -- oh, couple other points. Most of the cases, Your Honor, that were cited to you, in fact, the JEFFERSON v. INGERSOLL and the BURLINGTON NORTHERN case that Mr. Anderson cited to you, both Seventh Circuit cases where Mr. Anderson is from, of course, Chicago, he would be familiar with those cases, I am as well, those both involve the release of actual

damages, not a statutory damage, limited statutory damage claim, which is what we have here. And again, in this case, all actual damages are preserved. They are not being released. And I don't think I heard from either Mr. Schulman or Mr. Anderson any convincing explanation, in fact, I didn't really hear any explanation at all, as to why people who have the kind of actual damage claims against LexisNexis could not pursue those after this settlement.

As this Court knows, there is case after case after case brought under the Fair Credit Reporting Act on an individual basis where settlements are routinely 25,000, 50,000, 100,000, levels at which this Court or others have said routinely do not lend themselves to a class action. These claims are not appropriate for class action treatment, and they have been preserved. And they can be pursued after this settlement.

I would point out that at the end of this whole process, there has not been one objection raised by the objectors to Professor Richards's Declaration valuing the injunctive relief. So the record that you have before you is bereft of any objection as to his conclusions. Now, Mr. --

MR. SCHULMAN: Your Honor --

MR. CADDELL: Excuse me, Mr. Schulman, if you

will let me finish. Mr. Schulman says in his brief because it is not precise, he says because it is not an ascertainable calculation or valuation, you have to disregard it. That's not the same as saying he lacks credentials. It is not the same as saying he doesn't have a valid basis for stating his opinion. And he didn't ask that it be disregarded in the same way that he asked that the Declarations of Miller, Professor Miller and Professor Mullenix be disregarded. If you have a place to point to in your objection where you asked for that --

MR. SCHULMAN: I said it was facially unreliable because it didn't consider half of the equation. So it is basically unreliable and should not be admissible for that purpose under the DAUBERT decision.

MR. CADDELL: Okay. I think that's not an objection, Your Honor. I think it is a criticism, but not an objection. He made a very clear objection to the Declarations of Miller and Mullenix asking that they be disregarded and stricken. He has not done so, and frankly, it may be because the time for his objection had passed before he knew that Professor Richards had even filed a Declaration.

But in any event, that is in the record, and it is unrebutted.

Finally, Your Honor, I would refer the Court to

Document 104, which is the plaintiffs' responses to objections to the class action settlement, Pages 2 through 10, where the plaintiffs not only quote WAL-MART v. DUKES, but actually discuss in detail the entitlement to a (b)(2) class which releases incidental damages.

THE COURT: Let me ask you a question: I'd like to hear your response to Mr. Anderson's argument regarding the statutory damages not being automatic and computer-driven, and therefore, not incidental, in that the range from 100 to 1,000, you've got different facts that lead to different results. So what's your response to that?

MR. CADDELL: Your Honor, in this case, there would be no different facts for any class member to make in a statutory damages claim. The statutory damages claims advanced in a class action in this case would in fact be driven by one fact, and that would be the defendants' conduct, not by any information peculiar to the individual plaintiffs. And that, I think I can demonstrate that by, I don't know, do we have the questionnaire in the record? I think we may have filed this with respect to the motion that was before the Court about the website that at least initially misrepresented the settlement. The Watts Guerra, and you saw Mr. Anderson, he talked about the questionnaire that they

had. They were screening people and they knew these people had claims. Ironically, what they did was, they eliminated people that had claims. On their questionnaire, it is a one-page questionnaire and it is a little misleading, because you may think you are just answering a questionnaire when you actually are signing an agreement. But on the first page, it says: "Claim-related information." Item Number 1 says: "Have you ever requested a copy of your Accurint report from LexisNexis?" Then in parenthesis underneath, it says, "If yes, then you are ineligible for our representation. We don't want to represent you if you have ever requested a copy of your file from Accurint." Then the second question is, "Have you ever disputed any of the information contained in your Accurint report?" Again, it says, "If yes, then you are ineligible for our representation." Actually, those are the people that would have individual claims, because those people would have taken it upon themselves to contact LexisNexis and either request a copy of their file or dispute some of the information on their file. As to everyone else, their relationship with LexisNexis would be the same.

We don't know, Mr. Anderson said, well, there are different products and they are different inquiries and some people may have had some reports pulled on them

and other people may have had other reports on them. The reality is, because they didn't maintain their records under the Fair Credit Reporting Act, we don't have records of inquiries and of the reports that were issued in these cases. So the information that you have as to class members would be virtually the same for every class member. So there would be no individualized inquiry under the statutory damages claim. The statutory damages claim would be simply was it a consumer report, and then was it willful, and then you would assess the damages for the individuals and it would be the same for every individual times however many individuals you had.

So it is almost the -- it is the very definition of incidental in that respect. There would never be an instance where anyone would be called to testify as to their mental anguish, like Ms. Niles. I mean Ms. Nix. "I've been getting calls from bill collectors and I've been trying to get them to quit calling me and harassing me." That would never happen with these statutory damage claims.

Now, Ms. Nix on an individual basis, an individual can still bring the statutory damage claim or an actual damage claim. There was a slight misrepresentation by Mr. Anderson. He says the statutory damages statute says you can get $100 to $1,000.

Actually, what it says is you can get $1 to $100 for your actual damages. So on an individual basis you can still bring a claim for statutory damages with respect to violations, but you can bring your claim for actual damages. So the reality is, what's being released in this case is only the claim that could be made against LexisNexis for refusing to treat these reports as being consumer reports under the Fair Credit Reporting Act. That's about it. And that would be brought on a class basis, and it would be incidental to the injunctive relief, because it would be the same answer for every member of the class.

THE COURT: All right.

MR. CADDELL: I think that's it.

MR. BENNETT: To answer on that point directly, the Fourth Circuit has considered what you look at in individualized -- I mean in a calculation of the 100 to 1,000 and determined how individualized it is. In STILLMOCK v. WEIS MARKETS. And I apologize, I don't have the F.2d or F.3d number, but it is easy enough. It was decided in 2010. And in STILLMOCK, a denial of class certification out of the District of Maryland was reversed and the argument below had been how individualized the calculation of statutory damages would be, how therefore they would predominate, and thus it was ineffective as a

class. And the second argument that's relevant here was that there were alternatives. You don't need a class action because individuals could prosecute their statutory damage claims because there's attorneys' fees, so you don't need a class action remedy. Both of those are relevant. The STILLMOCK case, the denial of class certification was reversed. The analysis was, sure, the variation, there could be a variation for one consumer of the 100 to 1,000, but it is not individualized in the form of the back pay like in the WAL-MART calculation. Instead, it is the number of violations. So if, for example, there was any way to determine, and I represent, no one has discovered a way to prove whether or not any of these errant objectors actually had a report issued on them in a way they could prove in Court. But if they wanted to prove it and they didn't have actuals and they went with statutory damages, it is exactly as counsel said, a computer calculation. Number of times that the report, the Accurint report was sold, number of violations. It is clearly, while there could be a variation like a computer variation between one consumer and the other, STILLMOCK would clearly find that it isn't a calculation that is individualized like the back pay issue. You could simply, the number of violations, two reports were sold versus three reports, and that's it.

Which is, if you look at the text that's cited in our briefing and if you reread the WAL-MART case, it is exactly that type of issue.

The second issue in STILLMOCK, Judge, that would be relevant, in STILLMOCK, the Fourth Circuit rejected the idea that there was any value to being able to have an individual statutory damage claim that you could then take off on your own and litigate. Different posture. In STILLMOCK, the question was whether or not the District Court of the District of Maryland was correct in saying you don't need a class action, it is not a superior device, because you can always take these strong statutory damage cases with an attorneys' fee remedy and run off to Court and litigate them on your own. And the Fourth Circuit said that's not viable. That's not certainly superior because there is no indication that people could actually do that. And so in this context, that same reasoning would apply. That is, the question of what is incidental is in part how individualized the determination is. Is it more than simply number of violations, and it is not, and the second question would be are you giving anything up, was this a material, core claim as opposed to an incidental one. And it clearly is not. There have not been any such statutory damage claims prosecuted by anyone, and no one filed any of these causes other than

our folks to any extent I'm aware of, and the actual damages that would have the value or not impacted. But the STILLMOCK case, it is a Fourth Circuit decision, and it provides the only analysis out there as to what elements you would use in a Fair Credit Reporting Act calculation of where between 100 to 1,000, and it is mechanical, as the Fourth Circuit explained.

THE COURT: All right. Mr. Anderson, I'll let you have the last word on that issue.

MR. ANDERSON: I'll be brief. With all due respect, the remarks you heard are wrong legally and factually. Let's start with the law. Fortunately, we have guidance right out of the Fourth Circuit, SOUTTER v. EQUIFAX INFO SERVICES LLC, 498 Federal Appendix 260, Page Number 265, a 2012 decision. There the Court at that jump cite says that "Statutory damages typically require an individualized inquiry," end of quote. That's the law.

And now let's apply that law to the facts of this case. We have a statute that says depending upon the defendants' culpability, the defendants' state of mind, statutory damages can range from $100 to $1,000 per violation. That range is going to be determined by the defendants' culpability at particular points in time. And again, we don't have to, this isn't Kimball talking, this is their complaint talking. They in their complaint, the

plaintiffs in the complaint on our behalf pointed out that the defendants' culpability, state of mind, should be assessed in terms of pre-ADAMS class and post-ADAMS sub-class. Now they have abandoned that. Okay. The plaintiffs themselves in the complaint filed on behalf of our clients alleged that there were different products, that there were different types of reports. And those different types of products and those different types of reports are probative of the statutory damage issues.

Judge, computers don't weigh the knowledge of a defendant. Computers don't decide the culpability of a defendant over a period of many years. Computers don't decide whether the right amount of statutory damages, one that is fair and equitable, is $100, $200, $800, or a thousand dollars. Juries do that, Judge. That's a Seventh Amendment right to a jury trial. And that is the epitome of an individualized damage determination. And that is what every Court that has looked at these kinds of statutory damages has held. I thank you for your kind attention today.

THE COURT: All right. Thank you all very much. Just like you all, you took the time to bombard me with all of this paper, I will take the time to resolve it. I'll do it as swiftly as I can, but I'm not making any promises.

I think I've got enough here. I have my information. And we will resolve it as quickly as we can. Thank you all again.

(Proceedings adjourned at 3:55 p.m.)

CERTIFICATE OF REPORTER

I, Jeffrey B. Kull, Official Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

__________/s/_________________

Jeffrey B. Kull,
Official Federal Reporter

__________/s/_________________

Date